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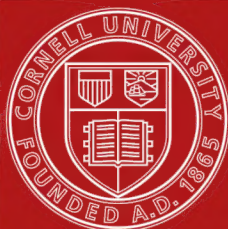
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**A. M. BOARDMAN and ELLEN D. WILLIAMS**

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## P R E F A C E .

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DURING the last ten years, nearly as many decisions, of the Supreme Judicial Court of this State, have been reported as were contained in the first twenty-six volumes of the "Maine Reports," which covered the space of twenty-nine years, and which are embraced in the very excellent Digest of Mr. Eastman.

The members of the profession, having fully appreciated and realized the benefits of "Eastman's Digest," long since felt the need of, and have been anxiously anticipating the announcement of a supplement thereto.

The necessity, which the publishers of the Reports felt themselves under, of meeting this urgent call for a supplemental Digest, and the partiality of intimate personal friends in the profession, have resulted in the revision and publication of this volume, which was originally intended merely for private use and convenience.

"The plan and arrangement of the work, and the divisions and sub-divisions of subjects," are the same as those of "Eastman's Digest," with a slight variation in a few instances, where the subject seemed to demand it, as also in the mode of the numbering of the sections.

The abstracts of a few cases, accidentally omitted in their regular order in the text, may be found in an APPENDIX, commencing on page 599. A few verbal errors, and a few *errata* in the references, have been discovered, and the latter noted.

That the present volume will compare favorably with similar works prepared by lawyers of larger experience, nice discrimination and much learning, is not presumed; but that a generous and learned profession may find it "better than none," is hopefully anticipated.

NORWAY, June, 1859.

W. W. V.





## JUSTICES OF THE SUPREME JUDICIAL COURT.

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### CHIEF JUSTICES.

PRENTISS MELLEN, LL. D., Portland.

Appointed July 1, 1820; term of office expired by limitation, at 70 years of age, October 22, 1834.

NATHAN WESTON, JR., LL. D., Augusta.

Appointed October 22, 1834; term of office expired October 21, 1841.

EZEKIEL WHITMAN, LL. D., Portland.

Appointed December 10, 1841; resigned October 23, 1848.

ETHER SHEPLEY, LL. D., Portland.

Appointed October 23, 1848; term of office expired October 22, 1855.

JOHN SEARLE TENNEY, LL. D., Norridgewock.

Appointed October, 1855.

### ASSOCIATE JUSTICES.

WILLIAM PITT PREBLE, LL. D., Portland.

Appointed July 1, 1820; resigned June 18, 1829.

NATHAN WESTON, JR., LL. D., Augusta.

Appointed July 1, 1820; appointed Chief Justice, October 22, 1834.

ALBION KEITH PARRIS, Portland.

Appointed June 25, 1829; resigned August 20, 1836.

NICHOLAS EMERY, Portland.

Appointed October 22, 1834; term of office expired October 21, 1841.

ETHER SHEPLEY, Saco.

Appointed September 23, 1836; appointed Chief Justice, October 23, 1848.

JOHN SEARLE TENNEY, Norridgewock.

Appointed October 23, 1841; appointed Chief Justice, October, 1855.

SAMUEL WELLS, Portland.

Appointed September 23, 1847; resigned March 31, 1854.

JOSEPH HOWARD, Portland.

Appointed October 23, 1848; term of office expired October 22, 1855.

RICHARD D. RICE, Augusta.

Appointed May 11, 1852.

JOHN APPLETON, Bangor.

Appointed May 11, 1852.

JOSHUA W. HATHAWAY, Bangor.

Appointed May 11, 1852.

JONAS CUTTING, Bangor.

Appointed April 20, 1854.

SETH MAY, Winthrop.

Appointed May 8, 1855.

WOODBURY DAVIS, Portland.

Appointed October 10, 1855; removed April, 1856; and re-appointed February 25, 1857.

DANIEL GOODENOW, Alfred.

Appointed October 10, 1855.

## REPORTERS OF DECISIONS.

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SIMON GREENLEAF, Portland.

Appointed September 2, 1820 ; third term of office expired June 24, 1832. .

JOHN FAIRFIELD, Saco.

Appointed June 27, 1832 ; resigned September 30, 1835.

GEORGE W. PIERCE, Portland.

Appointed October 8, 1835 ; died November 15, 1835.

JOHN SHEPLEY, Saco.

Appointed February 12, 1836 ; removed March 5, 1841.

JOHN APPLETON, Bangor.

Appointed March 5, 1841 ; removed January 22, 1842.

JOHN SHEPLEY, Saco.

Re-appointed January 22, 1842 ; second term of office expired Jan. 22, 1850.

ASA REDINGTON, Augusta.

Appointed January 16, 1850 ; term of office expired January 16, 1854.

SOLYMAN HEATH, Waterville.

Appointed February 28, 1854 ; removed February 7, 1856.

JOHN MILTON ADAMS, Portland.

Appointed February 7, 1856 ; removed January 29, 1857.

TIMOTHY LUDDEN, Turner.

Appointed January 29, 1857.

#### ERRATA.

- Page 23, sect. 3, add *Mansfield v. Rounds*, xxxii. 160.
- “ 36, sect. 18, line 2, for assignee, read assignor.
- “ 242, sect. 302, line 3, for *Baker* read *Blake*.
- “ 242, sect. 303, line 1, for *Baker* read *Blake*.
- “ 276, next to last line, for xxxii. read xxxiii.
- “ 301, sect. 40, line 2, for xxxiv. read xxxii.
- “ 307, sect. 62, line 2, for xxix. read xxxix.
- “ 337, sect. 21, line 2, for *Keen*, read *Keazer*.
- “ 343, sects. 5 and 15, last line, insert *Guptill v. Damon*,  
    xlii. 271.
- “ 456, sect. 64, lines 2 and 3, for *P. & S. P. R. R. Co.*,  
    read *Portl. Steam Packet Co.*

See APPENDIX.

# TABLE OF CASES,

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# D I G E S T .

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## ABANDONMENT.

A non user of a right, (acquired by use, to maintain a dam,) for twenty years, furnishes presumptive evidence of an extinction of the right by abandonment. *Farrar v. Cooper*, xxxiv. 394.

See INSURANCE, 51, 52, 55, 56, 57, 59, 63, 65, 71.

PAUPER, 37, 38, 45.

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## ABATEMENT.

- I. WHAT WILL ABATE A WRIT OR OTHER PROCESS.
- II. HOW TO TAKE ADVANTAGE OF MATTERS IN ABATEMENT.
- III. WHEN, AND BY WHOM, THE OBJECTION MUST BE MADE.
- IV. FORM OF PLEA.

*For abatement of taxes.* See TAX, 13.

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### I. WHAT WILL ABATE A WRIT, OR OTHER PROCESS.

- (a) WANT OF JURISDICTION, OR DEFECTS IN THE WRIT OR SERVICE.
- (b) DEATH OR DISABILITY OF PARTIES.
- (c) MISNOMER OR NON-JOINDER.
- (d) PENDENCY OF ANOTHER ACTION.

(a) *Want of jurisdiction, or defects in the writ or service.*

1. Chapter 119, § 5, of R. S. of 1841, may be pleaded in abatement by the principal defendant, in a trustee suit, wherein the only trustees are a corporation aggregate, having their established and usual place of business, and having held their last annual meeting, in a county other than that in which the suit is brought. *Scudder v. Davis*, xxxiii. 575.

2. For want of a sufficient service upon one of two or more defendants, sued jointly on a promise, the writ is abateable as to all. *Sawtelle v. Jewell*, xxxiv. 543.

3. So, if no legal service has been made upon any writ, it is abateable. *Mace v. Woodward*, xxxviii. 426. *Shaw v. Usher*, xli. 102.

4. A writ, against an administrator, after the estate has been rendered insolvent, upon a claim disallowed by the commissioners, containing an order to attach the goods of the intestate, is abateable. *Thayer v. Comstock*, xxxix. 140.

5. In writs of entry, the defendant may plead that he is not tenant of the freehold, in abatement, but not in bar. *Newbegin v. Langley*, xxxix. 200.

6. An action of replevin, in which the officer took a bond with only one surety, is abateable. *Greely v. Currier*, xxxix. 516.

7. A writ, brought before a magistrate, for trespass *quare clausum*, will not abate because the declaration contains matters of aggravation in the destruction of plaintiff's property, and claims three times the value; nor because it omits to state, that the trespass was committed wilfully and maliciously, and *contra formam statuti*. *Fogg v. Cushing*, xl. 315.

8. A party cannot plead a matter in abatement, which affects only his co-defendant. *Bonzey v. Redman*, xl. 336.

9. A writ, served by the sheriff on the defendants, one of whom is his deputy, may be abated by plea of the deputy; but when pleaded by another, it will avail none of the defendants. *Bonzey v. Redman*, xl. 336.

(b) *Death or disability of parties.*

10. At common law, the death of a sole party, *pendente lite*, abated the writ; and the process of petition for partition does not come within the provisions of R. S. of 1841. *Dwinal v. Holmes*, xxxvii. 97.

(c) *Misnomer or non-joinder.*

11. All the owners of the mill-dam complained of must be joined in a complaint for flowing, or it will abate. *Hill v. Baker*, xxviii. 9.

12. The non-joinder of a co-promisor can be taken advantage of only by plea in abatement. *White v. Cushing*, xxx. 267.

13. In tort, if the plaintiff be but a tenant in common with others, a non-joinder may be taken advantage of by plea in abatement, or by an apportionment in damages. *Holmes v. Sprowl*, xxxi. 73. *Jones v. Lowell*, xxxv. 538.

14. Whether a plea in abatement for a misnomer, setting forth only the omission of the initial letter of the middle name, is sufficient, *quære*. *State v. Homer*, xl. 438.

(d) *Pendency of another action.*

15. An action at law, commenced on the subject matter pending before referees, the submission not having been revoked, may be abated. *Small v. Thurlow*, xxxvii. 504.

## II. HOW TO TAKE ADVANTAGE OF MATTERS IN ABATEMENT.

16. When there is no return day, or an erroneous one, in a writ, ad-

vantage of such error can be taken only by plea in abatement or by motion. *Pattee v. Lowe*, xxxv. 121.

17. A defect in mesne process, if not apparent upon the record, can be taken advantage of only by plea in abatement; but if such defect be apparent upon the record, the writ will abate on motion. *Chamberlain v. Lake*, xxxvi. 388. *Mace v. Woodward*, xxxviii. 426. *Thayer v. Comstock*, xxxix. 140. *Greely v. Currier*, xxxix. 516. *Shaw v. Usher*, xli. 102.

18. Non-tenure can only be pleaded in abatement, and within the time prescribed by the rules of Court. *Fogg v. Fogg*, xxxi. 302. *Manning v. Laboree*, xxxiii. 343. *Eldridge v. Preble*, xxxiv. 148. *Newbegin v. Langley*, xxxix. 200.

19. If, in replevin, the same writ is used in different counties to the plaintiff's goods, the error must be shown in abatement. *Hall v. Gilmore*, xl. 578.

See VARIANCE.

### III. WHEN, AND BY WHOM, THE OBJECTION MUST BE MADE.

(a) AT WHAT TIME, PLEAS OR MOTIONS IN ABATEMENT MUST BE FILED OR MADE.

(b) WHAT WILL BE A WAIVER OF MATTERS IN ABATEMENT.

(a) *At what time, pleas or motions in abatement must be filed or made.*

20. In all matters of abatement, the plea in abatement or motion must be filed within the first two days of the term, to which the writ or process is returnable. *Fogg v. Fogg*, xxxi. 302. *Shorey v. Hussey*, xxxii. 579. *Pattee v. Lowe*, xxxv. 121. *Nickerson v. Nickerson*, xxxvi. 417. *Mace v. Woodward*, xxxviii. 426. *Smith v. Davis*, xxxviii. 459. *Warren v. Miller*, xxxiii. 220.

21. That, at the first term, none but a "special" appearance was entered for the defendant, forms no exception to the rule. *Snell v. Snell*, xl. 307.

(b) *What will be a waiver of matters in abatement.*

22. In replevin, after issue joined upon the merits, it is too late to object that no replevin bond has been returned. *Wilson v. Nichols*, xxix. 566. *White v. Cushing*, xxx. 267.

23. So, the pleading of the general issue to a writ having no return day, or an erroneous one, is a waiver of such defects; and the Court, upon motion, will allow the writ to be amended. *Pattee v. Lowe*, xxxv. 121.

24. When the defendant appears and pleads to the merits of a suit, he thereby waives any objections to the want of service of the writ. *Woodman v. Smith*, xxxvii. 21. *B. B. R. R. Co. v. Benson*, xliii. 374.

25. After pleading the general issue, no objection can be taken by the defendant, to the non-joinder of his joint co-promisor. *Reed v. Wilson*, xxxix. 585.

26. A general appearance and a continuance of the action, is a waiver of any and all defects in the service. *Shaw v. Usher*, xli. 102.

See WAIVER.

## IV. FORM OF PLEA.

27. The law does not favor pleas in abatement; and it requires that they should be pleaded with great precision and certainty. *Hazzard v. Haskell*, xxvii. 549. *Burnham v. Howard*, xxxi. 569. *Adams v. Hodsdon*, xxxiii. 225.

28. By a rule of Court, pleas in abatement, if consisting of matters of fact not apparent on the face of the record, must be verified by oath or affirmation. *Fogg v. Fogg*, xxxi. 302.

29. Such verification must be positive as to every matter of fact alleged in the plea. An affidavit, that the plea is true, according to the best knowledge and belief of the affiant, is not sufficient. *Fogg v. Fogg*, xxxi. 302.

30. When a plea, in order to be valid, requires a verification, it must be adjudged bad if it have no verification, or a defective one. *Fogg v. Fogg*, xxxi. 302.

31. Dilatory pleas should be such as to preclude all presumption, inference or argument against the party pleading; and should contain that technical accuracy, which is not liable to the most subtle objection, and which excludes all such supposable matter, as, if alleged on the other side, would defeat the plea. *Burnham v. Howard*, xxxi. 569. *Adams v. Hodsdon*, xxxiii. 225. *Tweed v. Libbey*, xxxvii. 49.

32. A plea to the mode of service of the writ, that the defendant's property was attached, but by the return on the writ, "no summons in the form of law was delivered to him, or left at his dwellinghouse or place of his last and usual abode," is defective, although he is declared against in the writ as an inhabitant of this State. *Tweed v. Libbey*, xxxvii. 49.

## ABORTION.

1. To procure an abortion upon a female, pregnant but not quick with child, was not, at common law, an offence, if done with her consent. *Smith v. State*, xxxiii. 48.

2. By R. S. of 1841, c. 160, § § 13 and 14, it is rendered equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not. *Smith v. State*, xxxiii. 48.

## ACCESSION.

When materials, belonging to several persons, are united, by labor, into a single article, forming a joint product, the owner of the principal materials will acquire the right of the property in the whole, by right of accession. *Pulcifer v. Page*, xxxii. 404.

## ACCESSORY.

1. R. S. of 1841, c. 167, § 4, is not to be understood as abrogating the distinction between principal and accessory, but as clearly preserving it. *State v. Ricker*, xxix. 84.

2. A substantive felony is that which depends upon itself, and not upon another felony, which is established by the conviction of the one who committed it alone. *State v. Ricker*, xxix. 84.

3. Under R. S. of 1841, the accessory may be indicted and convicted, without reference to the conviction of the principal, either in the indictment or on the trial, though the guilt of the principal is a necessary fact to be shown on the trial. The guilt of the principal will be alleged in the same manner, as if he alone had been concerned, followed by the averment of the acts done by the procurer, which constitute him an accessory before the fact. *State v. Ricker*, xxix. 84.

4. On an indictment for an assault with a dangerous weapon, with intent A. B. to kill and murder, a verdict that the accused was guilty of being accessory before the fact, of an assault with an intent to kill A. B., cannot be sustained; because such is not the offence charged. *State v. Scannell*, xxxix. 68.

## ACCOUNT.

1. Account is the proper remedy to be used by one part owner against another part owner of a vessel, for the adjustment of the expenses and profits of such vessel. *Pingree v. McGuire*, xxx. 508. *Hardy v. Sprowl*, xxxiii. 508.

2. The action of account is expressly sanctioned by R. S. of 1841, c. 115, § 57. In such action, two judgments are rendered; one interlocutory, determining whether the relations between the parties exist which give the plaintiff a right to an account; and the other final, as to the account found due by the auditors. *Closson v. Means*, xl. 337.

3. Auditors appointed under § 49 of c. 115, of R. S., are the proper tribunal in all actions of account; and the law does not require them to report the facts by them found, although one of the parties may request them so to do; but their report is conclusive when no issues of fact are made before them, and no charge of misconduct or partiality made against them. *Closson v. Means*, xl. 337.

4. Pleas in bar of the action of account must be filed prior to the interlocutory judgment. *Closson v. Means*, xl. 337.

5. A. having agreed in settlement with B. for stumpage, that he would "account or allow" B. "any and all deductions" which A. might obtain from the State on account of stumpage, B. having first to "pay or allow" A. "all his expenses, costs and trouble" in obtaining them:—*Held*—

1st. That, as the deductions had to be effected through the agency of A., who would thus know when they were made and to what amount, he was bound to account to or allow B. the amount of the same, less such reasonable expenses, costs and trouble;—

2d. That A., having by a transfer of the judgment which he held against B., put it out of his power to "allow" the amount thereon as contemplated when the agreement was made, he was bound to account to him for the same;—

3d. That a reasonable time having elapsed after the deductions were made, B. could maintain his action against A. for the amount due him without any previous demand; and—

4th. That B. was entitled to interest on the balance due him from the time when the deductions were made. *Hall v. Huckins*, xli. 574.

## ACKNOWLEDGEMENT OF DEEDS.

See DEED, 22, 44.

## ACTIONS AND REMEDIES IN GENERAL.

I. BY AND AGAINST WHOM, AND FOR WHAT, AN ACTION WILL LIE.

II. COMMENCEMENT OF ACTIONS.

III. WHETHER LOCAL OR TRANSITORY.

IV. MULTIPLICITY OF ACTIONS.

I. BY AND AGAINST WHOM, AND FOR WHAT, AN ACTION WILL LIE.

1. If a conveyance of an interest in land be made in the common form of a quitclaim deed, containing the stipulation: "provided said grantee shall pay said grantor or his assigns, twenty-two dollars annually from this date, on demand," until the happening of a certain event; and the grantee holds under the deed, but fails to make annual payments when demanded; the grantor may sustain an action of assumpsit against the grantee, to recover the money. *Huff v. Nickerson*, xxvii. 106.

2. When the plaintiff, by operation of law, is compelled to pay a debt, which, in equity and good conscience, the defendant should have kept from being so claimed and paid, an action may be maintained to recover the amount so paid. *Ticonic Bank v. Smiley*, xxvii. 225.

3. Damages may be recovered for non-performance of personal services, as well as for the neglect of performance of services to be performed by others. *Hoyt v. Bradley*, xxvii. 242.

4. To make a statement of what was contained in a deed of conveyance, and express an opinion of its effect, furnishes no proof that the person so making it, knowingly made such representations as would make him liable to an action. *Hoyt v. Bradley*, xxvii. 242.

5. The personal property of a bankrupt, whether inserted in his schedule of effects or not, instantly vests in the assignee on his appointment. And the purchaser of any such property of an assignee, may maintain an action for the recovery thereof, in his own name. *Jewett v. Preston*, xxvii. 400.



6. When a suit pending in court, and the contract upon which it was founded, were assigned; and afterwards the assignor died, and the action was prosecuted to judgment by the administrator; and the execution issued upon the judgment was satisfied by a levy upon land; a bill in equity, brought by the assignee, praying for a decree that the administrator should convey the land levied upon, to him, cannot be sustained, the remedy being against the heirs. *Simmons v. Moulton*, xxvii. 496.

7. In an action for use and occupation, where a third person, during the time, was in the actual occupation of the premises, and there was no letting to the defendant, but the only extent of his undertaking was, that he would pay the subsequently accruing rent; such an agreement cannot make the defendant liable in such an action. *Tobie v. Smith*, xxviii. 106.

8. One and the same person cannot, in the same suit, alone sustain the twofold character of plaintiff and defendant, to enforce a right and redress a wrong. *Denny v. Metcalf*, xxviii. 389.

9. The purchaser of personal property under attachment, may maintain an action against the attaching officer, for an injury done by him to it after the purchase. *Richardson v. Kimball*, xxviii. 463.

10. And the purchaser may waive the tort, and recover in assumpsit, any money in the hands of the tort-feasor, as the fruits derived from the wrongful act. *Richardson v. Kimball*, xxviii. 463.

11. When, on motion, the plaintiff was ordered to file a bill of particulars or specification of his claim, and the bill filed was merely;—"To bill for cutting and hauling logs on Brassua in the winter of 1841 and 42, \$3248,65," with credits reducing the amount to \$810,65, if objection had been taken at the trial, the plaintiff could not have recovered upon money counts; but as no objection was made in the offering of evidence pertinent only under those counts, the defendant must be considered as having assented thereto. *Parker v. Emery*, xxviii. 492.

12. If the plaintiff declares only upon an implied contract, for services performed, and the proof is, that they were performed under a special contract, and for a person other than the defendant, who had no connection with the transactions until long afterwards, the plaintiff cannot recover by proof of a promise by the defendant to pay such debt. To recover upon such evidence, there should have been a count upon the promise to pay the debt of the other person. *Parker v. Emery*, xxviii. 492.

13. Where one was sentenced to pay a fine and costs, and be committed until the payment is made, and after lying in prison thirty days, was liberated by the sheriff, upon giving his note for the amount of fine and costs, without being required to make a schedule of his property, or take or subscribe any oath to any schedule; an action can be maintained on said note, there being no corrupt agreement by the sheriff to allow these omissions of his duty. *Joy v. Phillips*, xxix. 255.

14. Where one brings a suit in the name of another person, the same defence may be made, as if he were a party to the record. *Sproule v. Merrill*, xxix. 260.

15. Any illegality in the transfer of a negotiable note, will vitiate the title of one who was a party to the illegality. *Sproule v. Merrill*, xxix. 260.

16. An action brought in the name of another person without his authority, is a groundless and unlawful suit, and, for damage done to the defendant in such suit, he may recover against the person by whom it was brought. *Foster v. Dow*, xxix. 442.

17. In such action, the amount of damages will not be lessened by proving that the person named as plaintiff in the original suit had a right of action. *Foster v. Dow*, xxix. 442.

18. Before an action can be maintained to collect fees for committing persons to the house of correction in Portland, they must be audited by the County Commissioners and found to be due. *Huse v. Cumberland*, xxix. 467.

19. If one procure an attachment upon real estate to be ante-dated, so that it falsely appears of record that it was prior to a conveyance made by the owner to a third person, and such third person, not knowing that the attachment was ante-dated, pays the creditor the amount which the attachment purports to secure, he may recover back the same in an action at law, although the money was paid to the defendant by the hand of his debtor, without any disclosure that he was paying it as the agent of the plaintiff. *Handly v. Call*, xxx. 9.

20. It is no defence to such an action, that the defendant intended no fraud upon the plaintiff, or any other person; or that he was ignorant that the plaintiff had furnished the money; or that the money was paid before there was any certainty that he would be injured by the attachment; or that there was no seizure on the execution, and that the plaintiff had never been disturbed. *Handly v. Call*, xxx. 9.

21. A. was in prison in Massachusetts, upon an indictment for having fraudulently obtained goods from the prosecutor by false pretences. The prosecutor then agreed with B., a friend of A., to procure a *nol. pros.* if he would pay the costs and give his notes for a specified sum, to be allowed for the goods. The prosecutor procured the *nol. pros.* to be entered, and A. to be thereby discharged. B. refused to give the notes as he had promised; and the promise being for an illegal consideration, no action could be maintained by the prosecutor upon it. *Shaw v. Reed*, xxx. 105.

22. After the lapse of a year, an action for a legacy, under some circumstances, may be maintained by a residuary legatee against the executor, before the final settlement of the estate. But it must appear that there are assets in the hands of the executor; and if it also appear that there are other and superior claims upon the assets, to their full amount, the residuary legatee must be postponed. *Smith v. Lambert*, xxx. 137.

23. Though the probate records would be evidence which the executor could not controvert, still it is not essential to the maintenance of the action, that they should show assets, liable to a residuary legatee. After the lapse of a year, there is a presumption that the debts due from the estate, have all been paid. *Smith v. Lambert*, xxx. 137.

24. A surveyor of highways, who, after having expended the assessments committed to him for the repair of the road, and found the same insufficient, is directed by the selectmen to proceed with the work, and thereupon expends a further sum, has no remedy against the town, unless such direction is in writing. *Morrell v. Dixfield*, xxx. 157.

25. Where the town voted to allow the plaintiff \$700, provided another person, who presented a claim against the town, would accept \$200 for his claim, which the latter refused; — *Held*, the town had a right to fix the condition; it was not an impossible condition; and not, therefore, one which is void. *Morrell v. Dixfield*, xxx. 157.

26. There must be proof of damage actually suffered, to enable one to maintain an action upon a contract of indemnity. *Hussey v. Collins*, xxx. 190.

27. Any action which survives against the personal representatives of one party, must be considered as surviving in favor of the personal representatives of the other party. *Valentine v. Norton*, xxx. 194.

28. An action for misfeasance of a sheriff or his deputy, does not survive against his personal representatives, nor in favor of the personal representatives of the party injured. *Valentine v. Norton*, xxx. 194.

29. Until a street has been opened, a grantee of one of the lots bounded upon it, according to a plan, can maintain no action for the creating of an obstruction upon the ground, represented upon the plan for the street. *Southerland v. Jackson*, xxx. 462.

30. Although a receipt for property attached was taken by direction of the creditor, and the officer's liability discharged, still the creditor can enforce payment of such contract in the name of the officer. *Hapgood v. Fisher*, xxx. 502.

31. Where one tenant in common has received, from others, rents and profits of the common property, he is accountable in an action of assumpsit, to his co-tenant for his share. *Buck v. Spofford*, xxxi. 34.

32. Where it was submitted to referees, to determine the validity of a title to real estate, and that, if they should adjudge the title to be perfect, they should award a just compensation therefor, and they adjudged the title good, and they awarded the compensation for it, no action lies by the grantee against the grantor, to recover money afterwards paid to extinguish an outstanding tax not known to the referees. *Pease v. Whitten*, xxxi. 117.

33. A decree of discharge in bankruptcy, like all judgments, is final upon the parties thereto. Hence, a creditor having proved his claim in bankruptcy, and having neglected to show such fraud, or concealment, or unlawful preference of creditors as would defeat the bankrupt's petition for discharge, or would vacate it, if obtained, so far as he would be prejudiced by it, is debarred from maintaining a suit upon his claim which had been so allowed. This disability, however, to show fraud and willful concealment, does not extend beyond those, who have had an allowance of such claims. *Humphreys v. Swett*, xxxi. 192.

34. If a mortgage debt has been paid, no action can be maintained upon the mortgage, even though it has not been formally discharged. *Hadlock v. Bulfinch*, xxxi. 246.

35. The receiving of money by a first mortgagee in discharge of his mortgage, which was to secure a claim rendered void by statute, will not subject him to an action, by a subsequent mortgagee for a lawful claim, to recover such money. *Ellsworth v. Mitchell*, xxxi. 247.

36. No action can be maintained in this State, upon a judgment recovered in another State, against a defendant, of whose person, the courts of that State had no jurisdiction. And the ownership of property, in whatever form, situated within a State, does not, of itself, give jurisdiction of the owner's person. *McVicker v. Beedy*, xxxi. 314.

37. Neither will an action, brought here upon such judgment, be aided by summoning the garnishee, and the payment of the sum disclosed. *McVicker v. Beedy*, xxxi. 314.

38. An action of debt may be supported for labor performed. *McVicker v. Beedy*, xxxi. 314.

39. The estate of a deceased person is not liable to pay for mourning apparel purchased by his family after his death. And one who furnishes such

apparel, believing the estate to be liable for it, and *expressly* stipulating that he would look to the estate for compensation, cannot maintain an action against any of the family upon an implied promise. *Jenks v. Mathews*, xxxi. 318.

40. A surety, who has become liable to his principal to pay the debt, and has sent his own money, by the debtor, to the officer holding a precept upon the demand, and the officer misappropriate the money, may maintain assumpsit against the officer, and without a special demand, although the officer, when he received the money, was not notified to whom it belonged. *Stetson v. Howe*, xxxi. 353.

41. When a verdict and judgment have been rendered against a party to a suit, he cannot maintain an action against the other party jointly with others, upon an allegation that said verdict was unjust and false, and was procured by them, through fraud and perjury, under a conspiracy to effect that purpose. The plaintiff is estopped by the judgment, from proving the charges alleged. *Dunlap v. Glidden*, xxxi. 435.

42. An action will not lie against one, who was a witness in another suit, for giving false testimony. *Dunlap v. Glidden*, xxxi. 435.

43. F. conveyed land to S. and gave him "an obligation" that if, at the end of a year, the land should not be worth the money paid, with interest, he would make up the deficiency, "or otherwise pay that amount on receiving a re-conveyance." At the same time S. gave F. a bond, that, on being paid the said amount, at any time within a year, he would re-convey the land:—*Held*, that during the first year, S. could have no right of action against F. on the obligation, because F. had the election to redeem within the year; but that at the end of the year, his right of action accrued, and the statute of limitations began to run. *Smith v. Fiske*, xxxi. 512.

44. Where an administrator, (prior to the Act of 22d of March, 1844,) had received pension money due his intestate, in trust for a *feme covert*, she and her husband jointly may recover the same. *Shirley v. Walker*, xxxi. 541.

45. An action cannot be sustained upon an award of referees, made under a statute submission of the parties. *Sargent v. Hampden*, xxxii. 78.

46. An action, brought by one co-surety against another, for contribution, for money paid after the defendant's discharge in bankruptcy, is not barred by that discharge, although the original obligation was payable before the defendant petitioned to be decreed a bankrupt. The claim was too contingent and uncertain to have been proved in a court of bankruptcy. *Dole v. Warren*, xxxii. 94.

47. Where, in a suit upon a bond, the obligee struck out the name of one of the defendant co-sureties, upon a suggestion being made of his bankruptcy, and recovered judgment against the principal and another co-surety, the former co-surety is not relieved. *Dole v. Warren*, xxxii. 94.

48. A person, who, without authority, prosecutes a groundless suit in the name of another, is liable to the defendant in such action, for the expenses and damages to which he has been subjected thereby, beyond the amount of the taxed cost. *Moulton v. Lowe*, xxxii. 466.

49. An omission to call for the authority to commence such suit, is not a waiver of his right to recover against the person who wrongfully commenced it. *Moulton v. Lowe*, xxxii. 466.

50. Where one had sued another for his own benefit but in the name of

a third person, without authority, and upon a failure of such action, the nominal plaintiff had paid the bill of cost, assumpsit will lie on an implied promise, to recover the amount so paid, against the plaintiff in interest. *Stuart v. Lake*, xxxiii. 87.

51. The defendant was selected by the principal, in a debtor's relief bond, to hear his disclosure, and united with the other magistrate in granting a discharge-certificate, when, in fact, the defendant had no authority to act as such magistrate; whereby the surety in the bond was obliged to pay the same;—*Held*, that for such assumption of authority, the surety could maintain no action against him. *Brookings v. Cunningham*, xxxiii. 103.

52. An action against a customer, as for an article sold and delivered, cannot be maintained by the manufacturer, unless it have been accepted. *Moody v. Brown*, xxxiv. 107.

53. For a party who claims under a tender, made after the agreed pay-day, and relies upon circumstances to justify the delay, a suit at law is not an available remedy, although the time of payment was not of the essence of the contract. *Hill v. Fisher*, xxxiv. 143.

54. Where one, in the sale of land subject to a mortgage, represents that a specified sum only, is due upon the mortgage, which is deducted from the agreed price of the land, the grantee is entitled to have a deduction of the excess due upon the mortgage, over and above that specified sum, in a suit upon a note given for the purchase money. *Stiles v. Sherman*, xxxiv. 344.

55. A special Act extended the existence of a corporation for a limited period, for the collection of its debts, and authorized its trustees to institute such actions in its name, and prosecute the same to final judgment;—*Held*, that such actions, commenced within the allowed period, may be prosecuted after it has expired. *Bank v. Cooper*, xxxvi. 179.

56. For aid given to the defendant in a fraudulent transfer or concealment of his property, pending an action of tort, sounding in damages, R. S., of 1841, c. 148, § 149, gives to the plaintiff no right of action, he not being a creditor. *Craig v. Webber*, xxxvi. 504.

57. Where the plaintiff performs services for another, at the request of the defendant, and he knew that the defendant acted only as the friend and agent of such third person, he can maintain no action against the defendant for compensation, although such other person was a partner of the defendant. *Batchelder v. McKenney*, xxxvi. 555.

58. One, who instructs a town school without a statute certificate, cannot recover his wages against the town, or against the agent who employed him, although the agent might not have been sworn, or the district legally established, or the town neglected to choose a S. S. Committee. *Jose v. Moulton*, xxxvii. 367.

59. One cannot make another his debtor, by paying his promissory note, without request, express or implied. *Willis v. Hobson*, xxxvii. 403.

60. An expressman received money from the maker to pay a note to a bank, which money he otherwise disposed of; on the last day of grace, he requested the plaintiffs to pay the note for him, which was done; but, from the lateness of the request, the payment could not be made that day, and, to protect the teller, the firm name of the express company and of the plaintiffs were indorsed upon the note, which was paid next day by plaintiffs:—*Held*, that the plaintiffs could maintain no action upon the note against the maker. *Willis v. Hobson*, xxxvii. 403.

61. The creditor of a person under guardianship can maintain no action against the guardian. *Raymond v. Sawyer*, xxxvii. 406.

62. If one, with a full knowledge of all the facts, or with the means of knowledge, voluntarily pays money under a claim of right, he cannot recover it back. *Gooding v. Morgan*, xxxvii. 419.

63. A negotiable note operates as payment of an account in full or in part; and if an account be thereby paid a second time, under a mistake and without a knowledge that it had been previously paid, the amount so paid a second time may be recovered back. And such right of action would not be destroyed by a voluntary payment of the note, after a knowledge of the double payment had been obtained. But no action could be maintained to recover back the money paid to discharge such note. *Gooding v. Morgan*, xxxvii. 419.

64. When a person draws an order in favor of another, it is a presumption of law, that the consideration for it was paid or secured at the time the order was drawn, and will not sustain an action on the money counts. *Smith v. Poor*, xxxvii. 462.

65. After an estate has been represented as insolvent, a creditor cannot maintain an action against the administrator, unless his claim has been filed before the commissioners, even should the estate prove to be solvent. *McNally v. Kerswell*, xxxvii. 550.

- 66. Where the defendant was owner of a steamboat and one half of the boat of the plaintiffs, and it was agreed to stock the gross earnings of both boats and divide their proceeds equally at the termination of the season, and the defendant received the entire earnings:—*Held*, that in order to recover, in an action on an account annexed, their part of the earnings, the plaintiffs must show, that defendant had some earnings of both boats, which by right belonged to them. *Railroad v. White*, xxxviii. 63.

67. An action upon a judgment may be maintained, although an alias execution was subsequently issued thereon, on which the debtor was arrested and committed. *Moor v. Towle*, xxxviii. 133.

68. Where defendant cut grass on land claimed by the plaintiff, and against his will, an action is maintainable upon the promise of defendant, that he would pay for the grass on plaintiff's establishing his title. *Balch v. Pattee*, xxxviii. 353.

69. Proof, that damages have been sustained by the prosecution instituted by the defendant maliciously, and without probable cause, is sufficient to support an action for conspiracy in instituting such prosecution. *Page v. Cushing*, xxxviii. 523.

- 70. Where the plaintiff sold property to defendants, under fraudulent representations, and received payment by an unnegotiable note against third persons, the defendants are liable to the plaintiff on an implied guaranty. *Cushing v. Wyman*, xxxviii. 589.

71. Where payment of part only of a debt is made, and no consideration is disclosed for an agreement to forbear to collect the remainder, an action lies to recover such balance, notwithstanding the Act of 1851, c. 213. *Austin v. Smith*, xxxix. 203.

72. Where property insured is willfully and maliciously burned by a third person, no action can be maintained against the wrongdoer, for the money paid by the insurer, in his own name. *Ins. Co. v. Bosher*, xxxix. 253.

73. On a written acknowledgment of a deputy sheriff, that he has money in his hands, arising from a sale of property assigned by the owner to the

plaintiffs for the benefit of his creditors, and a promise to account to them as such assignees upon certain contingencies, no action is maintainable by the assignees after their fiduciary character has ceased, although said contingencies have arisen, unless they have some interest in the money, or prove that the suit is prosecuted at the request of one entitled to it. *Morrill v. Dunn*, xxxix. 281.

74. For work done by a defendant under a parol promise, that it should go in payment of a debt from which he had been discharged in bankruptcy, an action cannot be sustained, although the accounts of the parties remain unliquidated. *Sampson v. Curtis*, xxxix. 398.

75. An individual corporator, who has suffered damage in a contract made with an incorporated company, through the fraudulent acts and votes of its directors, under color of their office, can maintain no action against them for compensation, his remedy being against the company. *Smith v. Poor*, xl. 415.

76. An action cannot be maintained by the plaintiff on an agreement, made by the defendant with a third party to pay such third party, even though the consideration moved from the plaintiff. *Tewksbury v. Hayes*, xli. 123.

77. Under the Act of 1851, c. 213, no action can be maintained upon any demand or claim which has been settled, canceled or discharged by the receipt of any sum of money, or other valuable consideration, however small. *Weymouth v. Babcock*, xlii. 42.

78. Where one stipulates with another, for a valuable consideration, to pay money or do some other beneficial act for a third, the latter, if there be no objection other than the want of privity, may maintain an action for breach of such engagement, or seek his remedy directly against the party with whom his contract primarily existed; but the two remedies are not concurrent, but elective. *Bohanan v. Pope*, xlii. 93.

79. Where an injury is the result of negligence on the part of both parties, no action can be maintained. *Coombs v. Purrington*, xlii. 332.

80. The common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statute; and this principle is equally applicable to actions sounding in tort. *Lord v. Chadbourne*, xlii. 429.

81. No action can be maintained upon a memorandum of an auctioneer, of the sale by him of real estate, unless such memorandum, within itself or by reference to some other paper, show all the material conditions of the contract. *O'Donnell v. Leeman*, xliii. 158.

82. An action may be maintained upon an express promise to cancel and deliver a note on condition that the promisee should find a receipt, which he claimed to have received in discharge of the same debt, although the note was subsequently paid. *Gooding v. Morgan*, xliii. 168.

83. At common law, the assignee of a chose in action cannot maintain a suit in his own name, unless there had been an assent to the assignment and a promise by the debtor to pay the assignee. *Myers v. Y. & C. R. R. Co.*, xliii. 232.

84. An action for damages by a servant, for an injury sustained by the carelessness of a fellow servant in the same service, cannot be maintained against their common employer, unless there be some contributing fault on the part of such employer; notwithstanding the provisions of R. S. of 1841, c. 81, § 21. *Carle v. B. & P. C. & R. R. Co.*, xliii. 269.

85. No action will lie on a judgment of a justice of the peace, the record of which does not show that the defendant was served with process, without proof of such service. *W. I. Manufacturing Co. v. Goodwin*, XLIII. 431.

86. Where the defendant was master and part owner of a vessel, and the plaintiff part owner of the cargo, he may maintain an action against the defendant for his share of the proceeds of the sales of the cargo. *True v. McGilvery*, XLIII. 485.

See ATTACHMENT, 76.

BANK, 6; 21, 23.

CITY OF PORTLAND, 4, 9.

CONTRACT, 98.

## II. COMMENCEMENT OF ACTIONS.

87. Commissioners, appointed to make partition of lands upon several petitions between several parties, under an agreement, that certain extra services connected therewith should be remedied by them, and that the commissioners should apportion among them under the commission, cannot maintain a suit for their services against one alone of the parties; nor against all, until such apportionment be made. *Hamlin v. Otis*, XXXVI. 381.

88. An action may be commenced on a note, on the same day it was legally protested for non-payment. *Bank v. Paulk*, XL. 110.

89. Towns, furnishing necessary supplies to persons falling into distress, who have their legal settlement in another town, may recover for such supplies in an action, commenced within two years after the expiration of two months from the giving of said notice, where no answer was returned. *Robbinston v. Lisbon*, XL. 287.

90. But if an answer were returned within the time prescribed by statute, denying their liability, the action will be barred, if not commenced within two years from the return of such answer. *Robbinston v. Lisbon*, XL. 287.

See BOND, 24.

LIMITATION, 48.

## III. WHETHER LOCAL OR TRANSITORY.

91. Trover is a transitory action, and lies for a conversion of property, committed within the bounds of a foreign jurisdiction. *Robinson v. Armstrong*, XXXIV. 145.

## IV. MULTIPLICITY OF ACTIONS.

92. When a party has recovered in assumpsit, without objection, damages for the tortious acts of another, he cannot recover in trespass for the same cause, because the previous action was illegal. *Brown v. Moran*, XLII. 44.

See ABATEMENT, 15.



## ADULTERY.

1. An indictment against a man for adultery, is unsustainable if it neither charge that he was a married man or that the female was a married woman, at the time when the offence was alleged to have been committed. *State v. Thurstin*, xxxv. 205.

2. The crime of adultery is well laid in an indictment, if at the time of the offence, one only, of the parties, is alleged to be married. *State v. Hutchinson*, xxxvi. 261.

3. Adultery can only be committed by parties, one of whom, at least, is married, and by parties not married to each other. *State v. Weatherby*, xliii. 258.

4. Where the wife was divorced for the fault of the husband, and he married another, and cohabited with her without having obtained a like divorce, he does not thereby commit the crime of adultery. *State v. Weatherby*, xliii. 258.

See INDICTMENT.

## AGENCY.

- I. APPOINTMENT AND REVOCATION, AND HOW PROVED.
- II. EXTENT OF AUTHORITY, AND DELEGATION OF POWERS.
- III. RATIFICATION AND ADOPTION.
- IV. TIME AND MANNER OF EXECUTING AGENCIES.
- V. LIABILITIES OF PRINCIPAL, FOR ACTS OF AGENTS.
- VI. LIABILITIES OF AGENTS.
- VII. RIGHTS AND REMEDIES OF PRINCIPALS AND AGENTS.
- VIII. FACTORS.
- IX. PLEADINGS AND EVIDENCE.

## I. APPOINTMENT AND REVOCATION, AND HOW PROVED.

1. As a general principle the same individual cannot be the agent of both parties; but persons having undertaken certain duties of a peculiar character, such as brokers, are treated as agents of both parties. *Hinckley v. Arey*, xxvii. 362.

2. The authority of agents may be inferred from facts and circumstances connected with their transactions. *Trundy v. Farrar*, xxxii. 225.

3. A resolve of the legislature, authorizing the assessors of a plantation, in their own names and for the use of its schools, to recover the value of timber and grass wrongfully taken from the lands reserved for public use, is not a grant of the avails, but merely an appointment of agents for the public; which agency may be lawfully revoked by a repeal of the resolve. *Dudley v. Greene*, xxxv. 14.

4. An authority in the master of a vessel to receive a partial payment in advance of the freight, may be inferred from subsequent payments made to him on that account, with the approbation of the owner. *Drummond v. Winslow*, xxxviii. 208.

## II. EXTENT OF AUTHORITY, AND DELEGATION OF POWERS.

5. In making a contract for the composition of a debt, one man cannot be the agent of both parties; but when the composition is agreed upon with the creditor by the agent of the debtor, he can be the agent of the creditor for another and distinct purpose. *Hinckley v. Arey*, xxvii. 362.

6. Where a master of a vessel exceeds his authority in selling the same under instructions of the owner, the principal is not bound. And one dealing with a master, who is acting under special authority, is bound to know the extent of it. *Johnson v. Wingate*, xxix. 404.

7. Where goods are sent by sea, and the master of the vessel is also supercargo, he acts, (after the arrival at the port of destination,) in relation to the selling of the goods, as the agent of the consignor. And when he has unsuccessfully used all reasonable efforts to effect a sale, and is under the necessity of leaving port with his vessel, he is justified in committing the goods to a responsible commission merchant for sale. *Stone v. Waitt*, xxxi. 409.

8. In the absence of evidence that an agency was limited, it is to be considered a general agency. And such an agency includes the authority to commence and prosecute suits. *Methuen v. Hayes*, xxxiii. 169.

9. A written but unsealed authorization to use the name of the principal, in settling for him a controverted matter, does not justify the agent in affixing the seal of the principal. *Wheeler v. Nevins*, xxxiv. 54. *Baker v. Freeman*, xxxv. 485.

10. An authority, given by the vote of a corporation to sell and convey its real estate, may be reasonably construed to include a right to make a binding contract to convey at a future day. *Bank v. Hamblet*, xxxv. 491.

11. An agent, lawfully authorized to raise money and create liability on the part of an incorporated company, may also waive demand and notice on a note indorsed by such company, even *after* the note has been negotiated. He may also waive demand and notice to procure delay of payment, although in procuring delay he may *also* be the agent of the maker. Nor will the fact, that he agreed to pay more than the legal rate of interest for such delay, prevent a recovery against the company, upon their indorsement of the amount legally due. *Whitney v. S. P. Manuf'g Co.*, xxxix. 316.

See TAX, 23.

## III. RATIFICATION AND ADOPTION.

12. If a principal does not, in a reasonable time after actual or presumed notice of his agent's act, disapprove of the conduct of his agent, a presumption of assent and ratification will arise. *Johnson v. Wingate*, xxix. 404.

13. Ratification is equivalent to original authority; to be binding it must be made with full knowledge of all the facts. From the ratification or adoption of one specific act, no implication can arise, that another distinct, independent act of the same party has been adopted or ratified. *Forsyth v. Day*, xli. 382.

14. A principal directed his agent to perform an act in his behalf, which the agent had performed prior to the receipt of the directions: — *Held*, that the act of the agent was ratified by the receipt of the instructions. *Rice v. McLarren*, xlii. 157.

15. Authority given to an agent to arrange an unsettled affair and draw on

his principal for such sums as were necessary, is a virtual acceptance of a draft made with the knowledge and assent of such agent; but such draft cannot be substituted for another, payable to the order of a different person, without the knowledge or consent of the principal or his agent. *Gates v. Parker*, XLIII. 544.

#### IV. TIME AND MANNER OF EXECUTING AGENCIES.

16. In view of all the parts of an unsealed contract, signed as agent by one having authority, the agent will not be bound by it, if it be apparent that the intention was to make it the contract of the principal and not of the agent. *Rogers v. March*, XXXIII. 106.

17. To the foregoing rule, there is an exception, upon the ground of general convenience, and the usage of trade, that agents and factors acting for merchants resident in a foreign country, are held personally liable upon all contracts, whether they describe themselves as agents or not. *Rogers v. March*, XXXIII. 106.

18. An agent, authorized to sign the name of his principal, effectually binds him by simply affixing to the instrument the name of his principal, as if it were his own name. *Forsyth v. Day*, XLI. 382.

19. It need not appear by the instrument itself that the agent made it expressly as agent. *Forsyth v. Day*, XLI. 382.

See ATTORNEY, 2.

#### V. LIABILITY OF PRINCIPAL FOR ACTS OF AGENTS.

20. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made with its authorized agents, are express contracts of the corporation. *Trundy v. Farrar*, XXXII. 225.

21. If an agent for selling goods, with authority to take money only, shall sell his own goods and those of his principal, in one and the same sale, receiving payment in money and in other sorts of property, his principal is bound by the sale, provided the money received amounted to the value of his goods. *Moore v. Thompson*, XXXII. 497.

22. In order to hold a party on implied authority, it must appear that he had knowledge antecedent to, or concurrent with, the inception of the instrument, that the assumed agent was then using his name; that he permitted such use of it; and that injury has been sustained by the plaintiff in consequence of such permission. When such use has been frequent and notorious, slight evidence will be sufficient. *Forsyth v. Day*, XLI. 382.

23. A principal, whose agent, duly authorized, has completed a purchase of stock for him, cannot repudiate the transaction by reason of any neglect of his agent to inform him of the fact. *Haynes v. Hunnewell*, XLII. 276.

24. An agent, authorized to purchase one sixteenth part of a ship at forty dollars a ton, does not bind his principal by purchasing two sixteenths at forty four dollars a ton, one sixteenth being on his own account, unless subsequently ratified. *Starbird v. Curtis*, XLIII. 352.

## VI. LIABILITIES OF AGENTS.

- (a) To THEIR PRINCIPALS.
- (b) To THIRD PERSONS.

(a) *To their principals.*

25. Where one is employed to purchase a certain horse, and is limited in the price, he cannot make a profit out of the transaction to himself; and whatever money remains in his hands, after paying the price of the horse and deducting the stipulated pay for his services, may be recovered back by an action for money had and received. *Bunker v. Miles*, xxx. 431.

26. An agent of another, to sell real estate, must account to the administrator of his principal, on demand, for the proceeds of the sale, or he will be liable in damages to the amount for which the property sold, and interest from the time of the demand. *Wheeler v. Haskins*, xli. 432.

(b) *To third persons.*

27. An agent is liable for misfeazances, to the owner of the property injured, whether he acted by the direction of his principal or not. *Richardson v. Kimball*, xxviii. 463.

28. An agent who draws a bill in his own name is personally liable. *Fairfield v. Hancock*, xxxiv. 93.

## VII. RIGHTS AND REMEDIES OF PRINCIPALS AND AGENTS.

29. If an agent, acting under the direction of his principal, cuts timber by mistake, partly upon the wrong township, which his principal receives and disposes of, he can recover of his principal what he has been obliged to pay for damages in a suit for that trespass. *Drummond v. Humphreys*, xxxix. 347.

## VIII. FACTORS.

30. Where the same person is not only master of the vessel, but supercargo, he acts in two distinct characters; in the one case, a common carrier, in the other a factor. *Stone v. Waitt*, xxxi. 409.

See AGENCY, 17.

## IX. PLEADINGS AND EVIDENCE.

31. The agency of a witness may be proved by his own oath. *Methuen Co. v. Hayes*, xxxiii. 169. *Perkins v. Jordan*, xxxv. 23.

32. Where notes were given in payment for logs by the purchaser, and one of the payees gave a receipt for such notes "on account of logs sold by us," such receipt has no tendency to show, that the *maker of it* was the agent of his joint owners, in the sale of the logs. *Coburn v. Paine*, xxxvi. 105.

## AGENT FOR SELLING LIQUORS.

See LIQUOR.

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## AGREEMENT IN RESTRAINT OF TRADE.

See BOND, 14, 15.

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## AID TO AN OFFICER.

See ASSAULT AND BATTERY, 1, 2.

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## ALIENATION.

1. The term “alienation,” as applied to real estate, has a technical signification, and any transfer, short of a conveyance of the title, is not an alienation thereof. *Pollard v. Insurance Co.* XLII. 221.

2. A mortgage is not an alienation. *Pollard v. Insurance Co.* XLII. 221.

See INSURANCE, 2, 21.

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## AMENDMENT.

- I. GENERAL PRINCIPLES.
  - II. OF WRITS AND DECLARATIONS.
  - III. OF PLEADINGS.
  - IV. OF RECORDS, JUDGMENTS AND EXECUTIONS.
  - V. OF OFFICER'S RETURNS.
  - VI. IN OTHER CASES.
  - VII. EFFECT OF.
- 

## I. GENERAL PRINCIPLES.

1. An amendment of a writ, by striking out of the account annexed, a part of the charges and credits, is within the discretion of the Court, and is not a subject for revision on exceptions. *Wight v. Stiles*, XXIX. 164.

2. If the Judge rule, as a matter of law, that a specified amendment cannot be allowed, exceptions may be taken. *Rowell v. Small*, XXX. 30. *Herrick v. Osborne*, XXXIX. 231.

3. An original writ, without the seal of the proper court, is defective; and the defect is not amendable. *Witherell v. Randall*, xxx. 168.

4. Sections 11 & 12, c. 115, R. S., 1841, authorize amendments by striking out or inserting names of *defendants* only. *White v. Curtis*, xxxv. 534. *Woodward v. Ware*, xxxvii. 563.

5. In a suit upon an account, some of the items of which are for spirituous liquors sold in violation of Act of 1846, the plaintiff may amend his bill of particulars, by striking out the items for liquor, and recover on the account as thus amended. *Towle v. Blake*, xxxviii. 528.

See DISTRICT COURT, 5.

## II. OF WRITS AND DECLARATIONS.

6. In an action by one town against another on a count in *indebitatus assumpsit*, on an account annexed for supplies furnished an individual named, an amendment may be made, by alleging specially, such facts as would show a liability of the defendants for the same under the provisions of R. S. of 1841, c. 32. *Brewer v. E. Machias*, xxvii. 489.

7. The changing of the form of an action from *debt* to *case*, is unauthorized by law and void. *Houghton v. Stowell*, xxviii. 215.

8. If the declaration in a writ of entry omit to allege that the demandant had been seized and that the defendant had disseized, an amendment may be allowed to supply the defect. *Rowell v. Small*, xxx. 30.

9. In an action on a judgment for flowing, an amendment, stating the *time* and *mode* of the acquirement of the defendant's title to the mill and dam, it having been already alleged that the defendant owned and occupied the same, introduces no new cause of action, and is admissible. *Knapp v. Clark*, xxx. 244.

10. A declaration may be amended, by striking out the original counts, and inserting others, if the cause of action be the same, and the form of action can be retained. *McVicker v. Beedy*, xxxi. 314.

11. Plaintiffs may be allowed to amend their writ by striking out the averment that they were partners in trade. *Babcock v. Fowles*, xxxii. 592.

12. A count in trover, which alleges the property in the plaintiff, and that it came to the defendant's hands by finding, may be amended by adding an allegation of the conversion. *Lord v. Pierce*, xxxiii. 350.

13. To a declaration in *trespass quare clausum*, an amendment, introducing a count in *case*, alleging the damages to have been *consequential*, is not allowable. *Sawyer v. Goodwin*, xxxiv. 419.

14. In a writ of entry for land in fee, the declaration may be so amended as to claim merely a life estate. *Howe v. Wildes*, xxxiv. 566.

15. In an action of covenant broken, an omission to allege, in the declaration, that the instrument declared upon was under seal, is amendable. *Wing v. Chase*, xxxv. 260.

16. Misdescriptions in contracts or judgments in suit, are amendable, at the discretion of the Court as to terms. *Cummings v. B. B. Railroad*, xxxv. 478.

17. In trespass *quare clausum*, an amendment enlarging the plaintiff's close, as described in the declaration, cannot be allowed. *Robinson v. Miller*, xxxvii. 312.

18. In an action to recover a forfeiture for a horse being allowed to go at large without a keeper, in the *highway or road*, the plaintiff may rightfully amend by striking out "*highway or*." *Thornton v. Townsend*, xxxix. 181.

19. In assumpsit against A. B., as partners, the plaintiff may amend, under R. S. of 1841, c. 115, § 11, by discontinuing as to one, on payment of his costs, and take judgment against the other alone. *Cutts v. Haynes*, xli. 560.

See ABATEMENT, 23.

### III. OF PLEADINGS.

20. After a case has gone to the full Court on report, a motion to amend the pleadings for the purpose of introducing a new matter of defence, will not be granted, if the proposed defence would not be a valid one. *Hardy v. Nelson*, xxvii. 525.

21. The granting of amendments in the pleadings which form an issue of fact for the jury, in a trustee process, is at the judicial discretion of the Court. *Butman v. Hobbs*, xxxv. 227.

22. In a petition for partition, if an issue is presented as to a piece of land, and the presiding Judge is unable to determine whether it is included in the petition or not, he may authorize such an amendment or variance of the pleadings, as will prevent the jury from finding an immaterial issue; and that, too, without terms. *Ham v. Ham*, xxxvii. 261.

### IV. OF RECORDS, JUDGMENTS AND EXECUTIONS.

23. It is the duty of a magistrate, who has certified his record in an incomplete form, to complete the record and the certificate accordingly. *State v. Maher*, xxxv. 225.

24. No lapse of time will divest a court of record of its power to correct its record, rendered incomplete through the mistake of its clerk. *Lewis v. Ross*, xxxvii. 230.

25. Where the record omits to state, that a committee appointed by the S. J. Court, to report upon the doings of County Commissioners, were disinterested men, the defect may be amended. *Smith v. County Commissioners*, xlii. 395.

### V. OF OFFICER'S RETURNS.

26. Amendments of his return of a sale of the estate, right, &c. mentioned in the Act of 1829, c. 431, on execution, may be made by an officer, by leave of the Court, no rights of third persons intervening, if before they were made, the party, in looking at the return as it was, could not have misunderstood, that the proceedings by the officer had been substantially what the amended return shows them to have been. *Whittier v. Vaughan*, xxvii. 301.

27. An omission by an officer, to affix his signature to the return of a sale of property on execution, may be amended on proof to the Court, that the return is according to the truth. *Wilton Manufg Co. v. Butler*, xxxiv. 431.

## VI. IN OTHER CASES.

28. Where a petition for a review of the judgment and proceedings on a petition for partition has been presented in the name of one as guardian, and in behalf of certain minors, and notice has been ordered thereon, and the opposing party has appeared, it cannot be amended so as to make the minors the petitioners by such person as their guardian. *Elwell v. Sylvester*, xxvii. 536.

29. In a bill in equity to redeem mortgaged premises, it being the aim of courts of equity to make a final adjustment of the rights of all persons interested in the subject matter, plaintiff may amend by making interested persons parties, upon such terms as the court may designate. *Bailey v. Myrick*, xxxvi. 50. *Haskell v. Hilton*, xxx. 419.

30. It is unusual to allow an amendment to the defendant's answer to a bill in equity; and such an amendment will not be allowed, if it introduce a new ground of defence, existing and known to the defendant, when his answer was filed. *Howe v. Russell*, xxxvi. 115.

31. When a bill in equity does not comply with the rule of court, by being set forth "clearly, succinctly," &c., the cause cannot proceed; but amendments may be allowed on terms. *Boynton v. Brastow*, xxxviii. 577.

## VII. EFFECT OF AMENDMENTS.

32. In an action of assumpsit, if another person be made a co-plaintiff, by amendment of the writ by leave of court, the attachment of property upon the writ is thereby dissolved. *Moulton v. Chapin*, xxviii. 505.

33. When an amendment has been properly made, and is for the same cause of action originally embraced in the writ, the amended writ is treated as it would have been if so made when the suit was commenced; notwithstanding the amendment was not filed till the action would have been barred by the statute of limitations. *Heath v. Whidden*, xxix. 108.

## APPEAL.

## I. IN WHAT CASES AN APPEAL LIES.

## II. SECURITY TO PROSECUTE AN APPEAL.

## III. EFFECT OF AN APPEAL, AND PROCEEDINGS IN THE COURT ABOVE.

*For appeals from Probate Court.* See PROBATE COURT.

## I. IN WHAT CASES AN APPEAL LIES.

1. No appeal lies from a judgment rendered by default before a justice of the peace. *Harris v. Hutchins*, xxviii. 102. *Turner v. Putnam*, xxxi. 557.

2. Where the pleadings are closed by a demurrer and joinder, in an action before a justice of the peace, and the action is carried by appeal to the Dis-



trict Court, no appeal lies from the decision of that Court, upon the same pleadings, to the S. J. Court. *Putnam v. Oliver*, xxviii. 442.

3. An action, commenced before a justice of the peace, cannot be brought into this Court by an appeal from the District Court on a demurrer in law, or agreed facts. *Holt v. Barrett*, xxix. 76. *English v. Sprague*, xxxii. 243. *Giles v. Vigereaux*, xxxii. 565. *Roberts v. O'Conner*, xxxiii. 496.

4. There is no right of appeal to the District Court from a *joint* decision of the County Commissioners of two or more counties. *Banks, appellant, &c.* xxix. 288.

5. An appeal can be taken in all cases from a judgment of a justice of the peace, when the judgment is a final decision of the action, and not merely interlocutory. It cannot be taken from a judgment of *respondeas ouster*. *Waterville v. Howard*, xxx. 103.

6. If the assessors of a town, through an error in judgment, make an over-valuation of one's property, and thereby assess an inhabitant of a town too much, or tax him for property not belonging to him, his remedy is by appeal to the County Commissioners only. *Stickney v. Bangor*, xxx. 404.

7. It is not necessary that a justice of the peace wait forty-eight hours to give opportunity of appeal, under the Act of 1846, c. 205; but an appeal may be taken after commitment. *Ricker, petitioner*, xxxii. 37.

8. In actions of trespass *quare clausum*, originating before a justice of the peace, no appeal lies from the District Court, except in cases where title to land was pleaded before the justice. *Moore v. Dunlap*, xxxiii. 227.

9. In *scire facias* upon a recognizance for the appearance of a person charged with crime, no appeal lies for the State, from the judgment of the District Court, sustaining a demurrer to the *scire facias*. *State v. Jackson*, xxxiii. 259.

## II. SECURITY TO PROSECUTE AN APPEAL.

10. To entitle a party to an appeal in a criminal prosecution, nothing more can rightfully be required than reasonable security for the appearance of the appellant, and the prosecution of the appeal. *State v. Gurney*, xxxvii. 156.

11. An appeal from the judgment of a justice, without a recognizance by the party appealing, is nugatory and void. *Dolloff v. Hartwell*, xxxviii. 54.

## III. EFFECT OF AN APPEAL, AND PROCEEDINGS IN THE COURT ABOVE.

12. An appeal from the doings of County Commissioners, opens to the consideration of the committee, the whole question which was before the County Commissioners. *Winslow v. Co. Comm'rs*, xxxi. 444.

13. On appeal from the judge of probate, the facts and all matters of mere discretion are to be determined by the Judge, sitting at *Nisi Prius*, whose judgment thereon is final. *Crocker v. Crocker*, xliii. 561.

14. If, upon facts found by him, a question of law arises, his decision is subject to exceptions to be heard by the Court in *banc*. Where no exceptions have been taken to any ruling of the presiding Judge, the case is not properly before the Court. *Crocker v. Crocker*, xliii. 561.

See Costs, 32.

## APPROPRIATION OF PAYMENTS.

See PAYMENT, 25—36.

## AQUATIC RIGHTS.

1. The rule of the common law, that riparian proprietors own to the thread of fresh water rivers, has been adopted in this State. *Brown v. Chadbourne*, xxxi. 9.

2. A stream, which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use, as a passage way. *Brown v. Chadbourne*, xxxi. 9. *Treat v. Lord*, xlii. 552.

3. Though the adaptation of the stream to such use may not be continuous at all seasons, and in all its conditions, yet the public right attaches, and may be exercised whenever opportunities occur. *Brown v. Chadbourne*, xxxi. 9.

4. When a stream is inherently, and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, the public easement exists, notwithstanding it may be necessary for persons floating logs thereon, to use its banks. *Brown v. Chadbourne*, xxxi. 9. *Treat v. Lord*, xlii. 552.

5. Where the proprietor of such a stream, by means of a dam and an accumulation of his logs above the dam, has, under claim of a right to control the stream, designedly obstructed the running of the plaintiff's logs, and refused to make any provision for the passage of them, the plaintiff is justified in booming defendant's logs, repairing and opening the proprietor's sluices, for that purpose; *provided* that that be the mode of effecting the object, least detrimental to the proprietor. *Brown v. Chadbourne*, xxxi. 9.

6. In a suit against the proprietor for such injury, the plaintiff may recover for the damage, and, among the items, the expenses of booming the defendant's logs, and of repairing his sluices. *Brown v. Chadbourne*, xxxi. 9.

7. All the citizens of a country, by the common law, have an inherent right in common to navigate its navigable tide waters, fresh water rivers and lakes, of which they cannot be deprived by the government. *Moor v. Veazie*, xxxii. 343.

8. The common law accorded to the sovereign power, the "care, supervision and protection" of this common right. And the power which has the "care, supervision and protection" of a common right, is bound to regulate its use in such manner, that it may be safe and convenient; which includes the right to remove obstructions, to improve, or to render more safe and convenient the waters for the purposes of navigation. *Moor v. Veazie*, xxxii. 343.

9. To render the common right more beneficial, the State may encourage new modes of navigation, and, for that purpose, may grant an exclusive use, for a term of years, of the waters in the new mode, as a compensation for the skill, expense and risk required for its introduction. *Moor v. Veazie*, xxxii. 343.

10. No accidental or intentional obstruction in a stream, not there in its natural state, will legally take from it its inherent and natural capability as a public highway. *Treat v. Lord*, XLII. 552. *Brown v. Black*, XLIII. 443.

11. Streams, which are so small and shoal that no logs can be driven in them without being propelled by persons traveling on their banks, are not navigable in any sense to give the public a right of way in them. *Treat v. Lord*, XLII. 552. *Brown v. Black*, XLIII. 443.

12. A bridge across a navigable river, may not necessarily be an obstruction to navigation, and if it can reasonably be so constructed as not to interfere with navigation, it should be so done. *State v. Freeport*, XLIII. 198.

See BRIDGES.

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## ARBITRATION.

### I. SUBMISSION.

### II. AUTHORITY AND DUTY OF THE ARBITRATORS.

### III. AWARD.

### IV. EFFECT OF AN AWARD, AND HOW ENFORCED OR AVOIDED.

#### I. SUBMISSION.

1. Consent of parties cannot confer upon the S. J. Court the power to receive and accept an award of referees, made under a submission entered into before a justice of the peace according to R. S. of 1841. *Sargent v. Hampden*, XXIX. 70.

2. If a submission before a justice be made of all demands arising between the parties after a specified day, a specification of the claims must be annexed to the submission. Such specification is dispensed with only when all demands are submitted. *Pierce v. Pierce*, XXX. 113.

3. Where two arbitrators are selected, who are to choose a third in case of disagreement, and such third referee is selected, but not in writing, and the parties acquiesce by submitting questions to the three, it is too late afterwards, to object to the competency of such third referee. *Knowlton v. Homer*, XXX. 552.

4. If it appear by the submission to have been the intention of the parties that a decision by a majority of the referees shall be binding, it is not necessary that the three shall sign the award. *Knowlton v. Homer*, XXX. 552.

5. It is competent for parties to submit matters in dispute between them to arbitrators, and to confer on those arbitrators such powers as they may deem proper, provided they do not violate any rule of law. *Anderson v. Farnham*, XXXIV. 161. *Cushing v. Babcock*, XXXVIII. 452.

6. Administrators have authority to submit to referees any controverted claims, affecting the estates under their care. *Kendall v. Bates*, XXXV. 357.

7. To a submission "of all demands except heirship," entered into by parties between whom there existed no controversy respecting inherited estates, no specific demand need be annexed, inasmuch as the words "except heirship" are inoperative. *Kendall v. Bates*, XXXV. 357.

8. A submission to referees under the statute, is one of the modes provided by law for the decision of causes; and the course of proceedings upon such a submission may be altered at the pleasure of the Legislature; such an alteration merely affecting the remedy, without impairing the obligation of any contract. *Kendall v. Lewiston W. P. Co.*, xxxvi. 19.

9. Where the parties to a suit pending in Court, agree in writing to refer it, with stipulations that it shall be withdrawn, each party paying his own cost; if one of the referees declines to act, the agreement becomes inoperative. And whether one of the referees refused to act, may properly be left to the determination of the jury. *Chapman v. Seecomb*, xxxvi. 102.

10. Where no time is fixed in which arbitrators are to make an award, it is to be done at their pleasure, unless either of the parties specially request them to make it in a reasonable time, and in case of refusal revoke the submission. *Small v. Thurlow*, xxxvii. 504.

11. When a matter has been referred to arbitrators, and they have the power to add another to their number, on a refusal to make an award, the matter referred cannot be withdrawn from their jurisdiction, unless they have refused to appoint the other referee, or have been requested so to do. *Small v. Thurlow*, xxxvii. 504.

12. A submission of a claim to referees, without any award thereon, does not change the nature of the claim or the liabilities of the parties. *Stoddard v. Gage*, xli. 287.

13. A statute submission is an independent proceeding, having no relation to the original action; it requires another entry, and is the subject matter of an independent judgment and execution. *Crooker v. Buck*, xli. 355

See ABATEMENT, 15.

REFEREE.

## II. AUTHORITY AND DUTY OF THE ARBITRATORS.

14. Where this and several other suits were referred to the same referees by separate rules of reference, without including any other matter, in all which the plaintiff was a party, but one of the defendants was not a party in any but this; and the referees met and heard all the cases at the same time, and the parties agreed, that the testimony of the numerous witnesses might be considered as applicable to each suit; and the referees, in making their separate reports, included their own charges for services in all the suits and all the other expenses of the references in their report as costs of this suit, and no part thereof in either of the other suits;—*Held*, that the referees had exceeded their authority in including expenses incurred in other suits, and that the report, therefore, could not be accepted; but, that although the referees erred in judgment, yet, as it did not appear that they were influenced by improper motives, the report should be re-committed, under the authority given by the Act of 1845, c. 168. *Hewett v. Bowley*, xxvii. 125.

15. A referee, appointed under chapter 138, may, by an alternative award, present legal questions for the consideration of the Court; but such an award must report, not the *testimony* from which the facts are to be found, but the *facts themselves*, as found. *Barnard v. Spofford*, xxxi. 39. *Kempton v. Stewart*, xxxi. 566.

16. Neither the law nor the consent of parties, confers upon the Court the right of adjudication upon testimony, heard and reported by a referee, without the aid of a jury. *Barnard v. Spofford*, xxxi. 39.

17. A submission by parties who had been co-partners, of all demands of every description, whether arising out of their business as partners or out of any other transactions, does not authorize the referees to adjudicate upon the property or debts due to the partnership. *Hayes v. Forskoll*, xxxi. 112.

18. If an action be referred by a rule of Court, which contains no restriction upon the powers of the referee, his award upon the law, as well as upon the facts, is conclusive. *Brown v. Clay*, xxxi. 518. *Whitmore v. LeBallister*, xxxv. 488. *Cushing v. Babcock*, xxxviii. 452. *Sweetsir v. Kenney*, xxxii. 464. *Smith v. Gorman*, xli. 405.

19. The construction of a contract by referees, appointed under a submission at common law, to settle the dispute in relation to that construction, is not re-examinable in this Court.

Thus, the plaintiffs contracted with the defendants to construct for them a railroad, the defendants reserving the right to alter the line or the gradients of the road, without the allowance of any extra compensation, if the engineer should judge such alterations necessary or expedient. Alterations were accordingly made, involving a large increase of expense; for which increase of expense, the referees allowed compensation to the contractors;—

And where defendants reserved the right to substitute piling instead of embankment, on a specified part of the road, and the substitution was made at an increased expense, for which the referees allowed a compensation;—

And where the submission stipulated, that the referees should take the contract, “as the basis for a settlement,” and the contract required that a fixed proportion of the cost of the road should be paid to the contractors in the stock of the company; and the referees, having ascertained the amount of that proportion, awarded that certificates for the same should be issued to the contractors;—*Held*, that in these several parts of their award, the referees did not transcend their authority. *Porter v. B. B. Railroad*, xxxii. 539.

20. It is not within the province of the referees to award costs, unless so authorized by the submission. *Porter v. B. B. Railroad*, xxxii. 539.

21. If, during the pendency of a suit, the parties submit it and “all demands between them,” by rule of court, the referees have authority, if the question be presented to them, to award that one of the parties shall convey to the other, real estate, the ownership of which had been in dispute between them. *Buck v. Spofford*, xxxv. 526.

22. A submission between co-tenants of a vessel, “concerning her earnings and expenses,” does not authorize the referees to allow moneys paid or received for insurance. *Sawyer v. Freeman*, xxxv. 542.

23. Where an Act for the division of a town and the incorporation of a new one, authorized the Commissioners of the county to appoint a committee to determine the value of certain property named, and any other property of the town not provided for, with “full power to settle any differences regarding the town property,” and also “to determine all privileges and burdens, that justice may be done between said towns;”—*Held*, that the committee had no power to decide respecting the support or settlement of paupers. *Holden v. Brewer*, xxxviii. 472.

24. A rule of court submitting to an arbitrator an action of replevin and all suits, claims and demands of the parties, with an agreement “that the referee shall treat this action as if it were assumpsit, and award accordingly, and no objection shall be made to the award,” will authorize him to award a specific sum in damages. *Merrill v. Gardner*, xli. 232.

25. Referees may receive or reject testimony, which, at common law, would be inadmissible. *Smith v. Gorman*, xli. 405.

## III. OF THE AWARD.

- (a) VALIDITY.
- (b) AWARD RESPECTING COSTS.
- (c) CONSTRUCTION.
- (d) RETURNING TO COURT, AND ACTION THEREON.

(a) *Validity of an award.*

26. If it appear, by the submission, to have been the intention of the parties, that a decision by a majority of the referees shall be binding, it is not necessary that the three shall sign the award. *Knowlton v. Homer*, xxx. 552.

27. Where two referees, after having heard the evidence, are unable to agree, and, according to the submission, select a third person, who expresses no desire to hear the witnesses, but takes the testimony from the other referees, they not differing in regard to the facts stated by witnesses, and neither of the parties express a wish that such third referee should hear the witnesses, an objection that he did not hear the testimony, cannot be taken to the award. *Knowlton v. Homer*, xxx. 552.

28. The one, who alleges that all matters in controversy have not been decided, must make it appear, that such matters were made known to the referees, and that they have not been decided. *Hayes v. Forskoll*, xxxi. 112.

29. It is not essential to the validity of an award, that it should contain a statement of the referees' fees, though it might perhaps be ground for recommitment. *Smith v. Smith*, xxxii. 23.

30. It is well settled, that an award, good in part and bad in part, may be sustained as to that part which is good, unless so connected, that they cannot be separated. *Porter v. B. B. Railroad*, xxxii. 539. *Boynton v. Frye*, xxxiii. 216. *Sawyer v. Freeman*, xxxv. 542. *Merrill v. Gardiner*, xl. 232. *Hanson v. Webber*, xl. 194. *Orcutt v. Butler*, xlii. 83.

31. An award by referees in favor of the demandant, in a real action, upon a submission by rule of Court, entered into by the administrator after the death of the tenant, and before the heirs were notified or appeared, cannot be accepted. The reference must be considered void. *Bridgham v. Prince*, xxxiii. 174.

32. In an action referred by rule of Court to three referees, "the award of whom to be final," an award signed by two of them only, cannot be accepted, although they certify that the other acted with them in hearing the parties. *Anderson v. Farnham*, xxxiv. 161.

33. Where the record and the rule of reference state, that the referee "is to decide this action on legal principles and establish the line between the parties," the law as well as the facts is thereby submitted to his decision. And the establishment of the divisional line by such referee is not in contravention of the statute of frauds, although, previous to the docket entry of the submission, no agreement had been made in writing to refer the matter. *Sweeny v. Miller*, xxxiv. 388.

34. To the validity of an award; founded upon a common law submission to three persons, to abide the determination of any two of them, it is essential that all three be present at the hearing; and that all were thus present, is sufficiently evidenced by a statement of that fact contained in the award, although it be signed by only two. *Thompson v. Mitchell*, xxxv. 281.

35. A provision in the submission, that the award should be "made and published in writing," only requires that the referees make an award in writ-

ing, and that the parties should be enabled to obtain a knowledge of it thus made. *Thompson v. Mitchell*, xxxv. 281.

35. A report of referees must be made to the court when holden for the ordinary business of a session of the same, within one year from the time of the submission, to meet the requirement of c. 138, R. S., 1841. *Field v. Bissell*, xxxvi. 593.

36. To make an award upon a parol submission binding, it must be proved that the parties mutually and concurrently agreed to abide by it. *Houghton v. Houghton*, xxxvii. 72.

37. What words were used in making such agreement, and the meaning attached to them by the parties, as it may be gathered from the circumstances attending their utterance, are to be determined by the jury. *Houghton v. Houghton*, xxxvii. 72.

38. Where the amount of damages in a suit pending, with other matters between the parties, is submitted to arbitrators, their award of the amount for which the defendant shall be defaulted is admissible in evidence upon the trial, and by that award the parties are bound. *Cushing v. Babcock*, xxxviii. 452.

39. Where an award settles the title to property, and the other claimants are to receive their just proportions of its value, no objection can be made to it for want of mutuality. *Hanson v. Webber*, xl. 194.

40. Nor is an alternative mode of payment therein set forth, conferring a privilege upon the party, if he should choose to accept it, but otherwise to pay a sum certain, any objection to the validity of an award. *Hanson v. Webber*, xl. 194.

41. A judgment on an award, founded on a submission containing a stipulation that the referee shall treat the action as if it were assumpsit, (it being replevin,) may be entered and upheld, although the arbitrator also award a lien upon the property replevied to secure the payment of the damages and costs. *Merrill v. Gardner*, xl. 232.

42. A recommendation to pay a certain amount is not an award. *Stoddard v. Gage*, xli. 287.

43. The examination of a book of accounts by one referee in company with one who obtained the award, after a full hearing of evidence and argument, in order to test the accuracy of an account transcribed by a witness, is not an *ex parte* hearing; and, in the absence of all proof of misconduct, partiality or fraud, does not affect the award. *Small v. Trickey*, xli. 507.

#### (b) *Award respecting costs.*

44. It is not within the province of referees to award costs, unless so authorized by the submission. *Porter v. B. B. Railroad*, xxxii. 539. *Hanson v. Webber*, xl. 194.

#### (c) *Construction.*

45. Where, in a submission, the parties have inserted a condition, that the referee should report the facts, for the consideration of the Court, a report of the evidence is not sufficient. *Barnard v. Spofford*, xxxi. 39.

46. Where an award is made for the payment of money unconditionally,

the party becomes liable to pay upon publication of the award, according to its terms, without any demand. *Thompson v. Mitchell*, xxxv. 281.

47. In an award, founded upon a submission of "all demands," a statement that the award is in full of "all accounts" to them submitted, must be understood as meaning "in full of all demands" to them submitted. *Kendall v. Bates*, xxxv. 357.

48. Neither a written submission nor an award can be explained or varied by parol testimony; but a party may identify, by parol, the controverted matters laid before, and acted upon by, the referees. *Buck v. Spofford*, xxxv. 526.

49. Awards are not to be scanned with critical nicety, as they are made by judges of the parties' own choosing; they are to be construed liberally and favorably, so that they may take their effect, rather than be defeated. *Hanson v. Webber*, xl. 194.

50. Where a submission is of divers subjects, distinctly enumerated, if it appear from the whole award, that all the matters submitted have been adjudicated upon, it is sufficient, though each particular is not specified in the award. *Hanson v. Webber*, xl. 194.

51. Thus an award, under a submission as to the ownership of a yoke of cattle, in which three persons claimed separate interests, that one of them should pay a sum of money to each of the others, is sufficient evidence that the ownership of the oxen is adjudged to be in him who is to pay the money. *Hanson v. Webber*, xl. 194.

52. Objection was taken to the award of referees, that the submission was, in fact, to the committee of the Board of Trade of Portland, and that their action should have been governed by the constitution and by-laws of that board, which it was not. In the submission they were named as individuals; but in their report, they styled themselves "the committee of arbitration of the Board of Trade of the city of Portland;" — *Held*, that the submission was to the persons named, in their individual character; and that no objection having been taken to their mode of proceeding, their decision is conclusive. *Stewart v. Waldron*, xli. 486.

53. An award, that A. was entitled to the "crops raised on said B's place," the last season, and that he was to have the "privilege" of taking them off, refers to annual crops; and A. is entitled to a reasonable time, within the year, in which to remove them. *Orcutt v. Butler*, xlii. 83.

(d) *Returning to court, and action thereon.*

54. The one who alleges that all matters in controversy have not been decided, must make it appear, that such matters were made known to the referees, and that they have not been decided. *Hayes v. Forskoll*, xxxi. 112.

55. Where a referee submitted, in an alternative award, not the facts, but the evidence, the award was recommitted. *Kempton v. Stewart*, xxxi. 566.

56. On motion to reject an award of referees, the affidavit of the defendant is not evidence that he was fraudulently induced to enter into the submission. *Smith v. Smith*, xxxii. 23.

57. An award, omitting a statement of the referees' fees, may, perhaps, be recommitted for that reason. *Smith v. Smith*, xxxii. 23.



58. Upon motion to accept an award of referees, the *onus* is upon the opposing party to impeach it; and in the absence of such impeachment, the award will be accepted. *Atkinson v. Crooker*, xxxv. 135.

59. An award, which had been recommitted for correction in form only, may be returned in a new draft. And the presumption in such case is, that the referees conformed to the direction of the court. *Atkinson v. Crooker*, xxxv. 135.

60. Upon the abolishment of the District Court, awards, which had been made returnable to that Court, might be returned to this Court, at any term prior to the period limited in the submission. *Kendall v. Lewiston W. P. Co.*, xxxvi. 19.

61. Interest on the amount awarded by referees cannot be included in the judgment upon the award. *Kendall v. Lewiston W. P. Co.*, xxxvi. 19.

62. The discretionary power of the court, to accept, reject, or recommit a report of referees, is only a judicial one, to be exercised upon consideration of the facts and circumstances of the case. *Long v. Rhodes*, xxxvi. 108.

63. Where no new evidence is offered, and no prejudice, bias or mistake, on the part of referees established, their award must be accepted. *Long v. Rhodes*, xxxvi. 108.

64. When a report of referees is made after the period limited in the submission, though it has been recommitted to the referees by the presiding judge, for want of sufficient notice to one of the parties, it is inoperative; and the recommitment will not give the referees subsequent jurisdiction. *Field v. Bissell*, xxxvi. 593.

65. No exception to the misjoinder of parties can be taken advantage of on the acceptance of the report, unless the objection is specially set forth and submitted to the court. *Smith v. Gorman*, xli. 405.

66. It is within the discretion of the presiding judge to grant delay, on the acceptance of the report of referees. *Smith v. Gorman*, xli. 405.

#### IV. EFFECT OF AN AWARD, AND HOW ENFORCED OR AVOIDED.

67. A judgment upon a report of referees, who have adjudicated matters legally submitted to their determination, is equally valid as when founded upon a verdict. *Pease v. Whitten*, xxxi. 117.

68. An award of referees upon a parol submission, is of no effect against a party, who had no notice of the time or place of their meeting, or of the decision which they made. *Cobb v. Wood*, xxxii. 455.

69. An action pending in court, is discontinued by a submission of it at common law. *Mooers v. Allen*, xxxv. 276. *Crooker v. Buck*, xli. 355.

70. When referees have fully heard the parties; have made up and signed their award; and have communicated its contents to the parties, their duties are closed; and they have no power to alter it or to destroy its effect by a refusal to deliver it, or by an attempt to recall it. *Thompson v. Mitchell*, xxxv. 281.

71. An acceptance of an award that one of the parties shall convey to the other real estate, the ownership of which had been in dispute between them, constitutes a valid judgment. *Buck v. Spofford*, xxxv. 526.

72. A party, in whose favor an award is made under a rule of court, is entitled to a judgment thereon, notwithstanding his creditor may have attached

the same, after the acceptance of the award, by a trustee process. *Holt v. Kirby*, xxxix. 164.

73. Whether a statute submission operates as a discontinuance of the pending suit, either before or after judgment thereon, *quære*. *Crooker v. Buck*, xli. 355.

74. No valid judgment can be rendered on the report of referees in a statute submission, except by consent, without allowing to the aggrieved party the time prescribed by statute, in which to present exceptions. *Crooker v. Buck*, xli. 355.

### ARREST.

1. To authorize the arrest of the body under R. S., 1841, c. 148, § 2, the certificate must set forth that the debtor has or owns property or means exceeding the amount required for his own immediate support, and that he is about to take with him such property or means, and reside beyond the limits of the State. *Bramhall v. Seavey*, xxviii. 45. *Furbish v. Roberts*, xxxix. 104. *Shaw v. Usher*, xli. 102.

2. The certificate for arrest on mesne process must be made before a magistrate of this State. *Bramhall v. Seavey*, xxviii. 45.

3. In an affidavit to justify the arrest of joint debtors on mesne process, it is not necessary to allege the belief that *each one* is about to depart, &c. An allegation that *they* are about to do it, is sufficient. *Cates v. Noble*, xxxiii. 258.

4. An arrest on mesne process, upon contract, is allowed only where the creditor, his agent or attorney, shall have previously made oath for the purpose, according to the requirements of R. S., c. 148, § 2, 1841. Hence, unless it show that the debtor was "about to depart and reside beyond the limits of the State;"—and to "take with him property or means exceeding the amount required for his own immediate support;"—and that the sum due the plaintiff amounted to "at least ten dollars," it is insufficient. *Sawtelle v. Jewell*, xxxiv. 543.

5. It seems, that by the common law an officer has authority to make an arrest upon reasonable ground of suspicion, without warrant; and if his suspicions vanish he may discharge the person arrested without bringing him before a magistrate. But he cannot lawfully detain him without warrant any longer than a reasonable time for bringing him before a magistrate. *Burke v. Bell*, xxxvi. 317.

6. An attachment of property *and* an arrest of the body are unauthorized by the same writ. And when a return of an attachment has been made upon the writ, the officer cannot justify a subsequent arrest of the defendant, by showing that the defendant did not own the property attached, or that the attachment was ineffectual. *Trafton v. Gardner*, xxxix. 501.

See OFFICER, 39, 40, 41.

## ARREST OF JUDGMENT.

See JUDGMENT.

## ASSAULT AND BATTERY.

1. The force which an officer or his aid may apply, to enable them to serve a legal precept, must be no greater than is necessary for the accomplishment of that purpose. *Murdock v. Ripley*, xxxv. 472.

2. It is for the jury to decide whether the degree of force used in such case, was unnecessary; hence, his own judgment, though honestly formed, and though he had no purpose to transcend his authority, is not conclusive as to the degree of force which was necessary; and for any excess he is responsible in damages in a suit at law. And though the plaintiff's resistance contributed to the injury, that resistance would not justify unnecessary violence. *Murdock v. Ripley*, xxxv. 472.

3. In R. S., c. 154, § 29, the Legislature have recognized as distinct offences, an assault with intent to murder, and an assault with intent to kill, unknown to the common law, the former being the greater crime and including the latter. And where a party is accused of the greater, the jury are authorized to find him guilty of the lesser offence. *State v. Waters*, xxxix. 54.

## ASSESSORS.

1. By c. 14, § 56, as amended, the assessors of a town, who are required to assess a tax upon a school district, are exempted from any personal liability, when they act with faithfulness and integrity; and any further liability is to rest solely upon the district. *Powers v. Sanford*, xxxix. 183. *Trim v. Charleston*, xli. 504.

2. An oath, taken by assessors, that they will "faithfully and impartially perform the duties assigned them," answers the requirement of the statute. *Patterson v. Creighton*, xlii. 367.

3. Assessors are required by statute, to ascertain from the lists of highway surveyors of the preceding year, who had not discharged their highway taxes for that year, and to place the amounts found due from such persons in a separate column of the money tax assessed by themselves. *Patterson v. Creighton*, xlii. 367.

4. "A list of the persons and the sums" required by statute to be delivered by the assessors to highway surveyors, may not properly be denominated a warrant. *Patterson v. Creighton*, xlii. 367.

5. Assessors, in the assessment of a tax, are liable only for "personal faithfulness or integrity." *Patterson v. Creighton*, xlii. 367.

6. R. S. of 1841, c. 14, § 56, affords no protection to assessors in assessing a tax which they were not obliged by law to assess; e. g., in assessing a tax against an inhabitant of another town. *Herriman v. Stowers*, XLIII. 497.

## ASSIGNMENT.

- I. OF CHOSSES IN ACTION AND OTHER RIGHTS.
- II. EFFECT OF AN ASSIGNMENT OF A CHOSE IN ACTION.
- III. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

### I. ASSIGNMENT OF CHOSSES IN ACTION, AND OTHER RIGHTS.

1. The interest of a mortgagee of land cannot, at law, pass to a third person, without an assignment, in some form, in writing, under seal, although the contract secured by the mortgage has been assigned by writing, without seal. *Smith v. Kelley*, XXVII. 237.

2. An assignment of the debtor's interest by virtue of a contract for the conveyance of land, made and received for the purpose of defrauding the creditors of the assignor, is void against creditors, subsequent as well as prior to the assignment. *Whitmore v. Woodward*, XXVIII. 392.

3. Where mutual dealings in account exist, the balance due may be assigned; and, after notice of the assignment, the assignee has an equitable right, which the court will protect, to the balance due at the time of the notice, which cannot be diminished by any claim of the other party, accruing or procured subsequently. WELLS, J., dissenting. *Bartlett v. Pearson*, XXIX. 9.

4. A note made payable to a bankrupt, after petition filed, and before the decree, passed to the assignee by operation of law. *Carr v. Lord*, XXIX. 51.

5. The assignment of a mere expectation of earning money, if there be no contract on which to found the expectation, is of no effect; but it may be made valid by a ratification of it, after the money has been earned. *Farnsworth v. Jackson*, XXXII. 419.

6. The delivery to the plaintiff of a receipt, approved by him, of property attached by an officer, is entitled to be protected, as an equitable assignment. *Jewett v. Dockray*, XXXIV. 45.

7. One of the partners may lawfully assign to a creditor thereof, a demand due to the partnership, after its dissolution. *Milliken v. Loring*, XXXVII. 408.

8. A., being indebted to C., thereafter delivered a note to him, against a third person, and took a receipt, whereby C. promised to account for it, when called for, or to return it; — *Held*, that the transaction was a valid assignment, and, being *bona fide*, could not be defeated by trustee process. *Hardy v. Colby*, XLII. 381.

## II. EFFECT OF AN ASSIGNMENT OF A CHOSE IN ACTION.

- (a) RIGHTS OF THE ASSIGNEE.
- (b) PAYMENTS TO, OR A RELEASE FROM, THE ASSIGNOR.
- (c) SET-OFF, AND OTHER MATTERS.
- (d) PLEADINGS AND EVIDENCE.

### (a) *Rights of the assignee.*

9. Where the holder of the equity of redemption, paid the amount secured by a mortgage of the land, and no intention of keeping the mortgage in force was disclosed at the time, and there was then no contract for the assignment thereof; and where, many years afterwards, the mortgagee made an assignment of the mortgage, and of the notes secured by it, to the holder of the equity, so paying the notes;—*Held*, that the mortgage was to be considered as discharged. *Given v. Marr*, xxvii. 212.

10. Where a suit pending in court and the contract, upon which it was founded, were assigned; and afterwards the assignor died, and the action was prosecuted to judgment by the administrator; and the execution issued upon the judgment was satisfied by a levy upon land;—*Held*, that a bill in equity, praying for a decree that the land thus levied upon should be conveyed to the assignee, should be against the heirs. *Simmons v. Moulton*, xxvii. 496.

11. If an assignee purchase a mortgage by the payment of a sum less than the amount actually due, the mortgager or his assignee will not be entitled to redeem without payment of the full amount due upon the mortgage. *Pease v. Benson*, xxviii. 336.

12. If the fraudulent grantee has paid part consideration, and the plaintiff in equity is willing to admit that the grantee holds in trust, and to convey to the plaintiff upon receiving such sum as was paid by him, no objection can arise to such an adjustment. *Whitmore v. Woodward*, xxviii. 392.

13. If the assignee bring an action, in the name of the assignor, for the whole amount of his account against the other party, and the defendant bring a cross-action, also, for the full amount of his account, and both actions proceed to judgment; under R. S., 1841, c. 115, the judgment debt in the lesser claim, by leave of court, may be set off in payment of so much of the larger; but the costs of that suit cannot be set off in further payment of the balance of the larger judgment, without the consent of the assignee. *WELLS, J.*, dissenting. *Bartlett v. Pearson*, xxix. 9.

14. If, pending a suit in which land had been attached, the plaintiff assign the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust; and if the assignment be stated in the appraisers' certificate, such statement is notice of the trust to any attaching creditor of the assignor. *Warren v. Ireland*, xxix. 62.

15. An assignment by the debtor to the creditor, of goods attached, or the proceeds of the same, includes the principal and interest, collected by an officer on a note taken for the sale of such goods on mesne process under the statute, although the note was made payable to such officer. *Gannett v. Cunningham*, xxxiv. 56.

16. The assignee of a debt and of the mortgage of personal property, by which the debt was secured, though the assignment was by delivery only, has the same right to possession of the property as the mortgagee would have had. *Smith v. Porter*, xxxv. 287.

17. An assigned note, belonging jointly to two or more assignees, may be released by either of them; and an action upon such note, brought in the name of one of the assignees, may be discharged by either of the co-assignees. *Weston v. Weston*, xxxv. 360.

18. Courts of law, in all cases, will uphold and protect the equitable interests of assignees. And an assignee cannot discharge such interests. *Pollard v. Ins. Co.* xlii. 221.

See ACTION, 84.

MORTGAGE, 52.

(b) *Payments to, or a release from, the assignor.*

19. After the assignment of a bond by an obligee, it cannot be revoked by the assignor without the consent of the assignee. *Reed v. Nevins*, xxxviii. 193.

*Pollard v. Ins. Co.* xlii. 221.

(c) *Set-off and other matters.*

20. If the assignee bring an action in the name of the assignor for the whole amount of his account against the other party, and the defendant bring a cross-action for the full amount of his account, and both proceed to judgment; under R. S., 1841, c. 115, the judgment *debt* in the lesser claim, by leave of Court, may be set off in payment of so much of the larger; but the costs of that suit cannot be set off in further payment of the balance of the larger judgment, without the consent of the assignee. *WELLS, J.*, dissenting. *Bartlett v. Pearson*, xxix. 9.

21. If one, summoned as trustee, is notified, that the debt by him owing, has been assigned to a third person, and he neglects to disclose such assignment, the trustee judgment and payment of it on a legal demand, furnish to him no protection against the claims of the assignee. *Milliken v. Loring*, xxxvii. 408.

(d) *Pleadings and evidence.*

22. After the assignment of all interest in a chose in action, upon which a claim in equity is founded, the bill must be brought in the name of the assignee; and the assignor need not be a party. *Haskell v. Hilton*, xxx. 419.

23. And a total want of legal or equitable interest in the plaintiff in a suit in equity, is fatal to the bill; and the objection may be taken by demurrer, or at the hearing. *Haskell v. Hilton*, xxx. 419.

24. If a father, after making an assignment of the services or society of his minor child, have retaken the child into his own keeping, the remedy of the assignee (if he have any) is not by replevin, but by an action on the contract. *Farnsworth v. Richardson*, xxxv. 267.

25. The obligee in a bond, after he has assigned the same, can maintain no action upon it, without the consent or request of the party in interest. *Reed v. Nevins*, xxxviii. 193.

### III. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

- (a) UNDER STATUTE.
- (b) GENERALLY.

#### (a) *Under statute.*

26. An assignment by a debtor, (made while the Act of April 1, 1836, was in force and unamended,) of his property for the benefit of his creditors, was void, if it required, from the creditors becoming parties thereto, a release from their demands, except so far as provided for in the assignment. *Vose v. Holcomb*, xxxi. 407.

27. Such a release, embodied in such an assignment, was inoperative and void; and a creditor, having made such a release in such an assignment, is not estopped or precluded from repudiating it, though he may have received several partial payments under the assignment. *Vose v. Holcomb*, xxxi. 407.

27. An assignment of a debtor's property, made for the benefit of his creditors, and containing a provision by which the subscribing creditors released all claims except under the assignment, and having been subscribed by a part only of the creditors, will not be defeated, as to other creditors, by a counter release, subsequently made by the debtor, discharging such subscribing creditors from the obligation of their release contained in the assignment. *Howe v. Newbegin*, xxxiv. 15.

28. An assignment under Act of 1844, c. 112, is not void, in consequence of a clause providing, that the subscribing creditors, "for the consideration aforesaid, do severally, for themselves, release all manner of actions, debts, demands and claims whatsoever, which they have against the assigning debtor." And, by signing such assignment, the creditor releases no claim, which does not come within the first section of the Act. *Doe v. Scribner*, xli. 277.

29. If a debtor, contemplating an assignment, convey his property, with an intention to delay, &c., his creditors, the assignment will not bar an action against him by a creditor, who had become a party to it. The assignment may be valid for some purposes and as to some parties, and invalid as to others. *Doe v. Scribner*, xli. 277.

30. An assignment for the benefit of creditors, wherein the substantial requirements of the statute are not complied with, is void. *Simmons v. Curtis*, xli. 373.

31. The object of the Act of 1844, c. 112, relating to assignments, was to secure the equal distribution of insolvent debtors' effects not exempt from attachment, among *all* their creditors, who, after notice, should become parties to the assignment, in proportion to their respective claims. *Berry v. Cutts*, xlii. 445.

32. Preferences, given by an assignment, or by the transaction to effect such distribution, of which an assignment is a part, render the assignment void; and that, too, whether they appear in the assignment itself, or by evidence *aliunde*. *Berry v. Cutts*, xlii. 445.

33. An insolvent debtor, contemplating an assignment for the benefit of his creditors, under the above Act, transferred portions of his estate to secure certain honorary liabilities, and shortly, thereafter, executed an assignment of his remaining property: — *Held*, that the transfers and the assignment were to be regarded as parts of one transaction; and, that inasmuch as the assignment did not provide for the *equal* distribution of the debtor's estate, it was fraudulent and void; and that the assignee was chargeable as trustee of the debtor. *Berry v. Cutts*, xlii. 445.

(b) *Generally.*

34. Where the general partner, (in a special partnership, subsisting and conducted in his name,) makes a general assignment of his property for the benefit of his creditors, without using any words to show that the partnership property was intended to be assigned, the partnership property is not thereby transferred; and the assignee can give no title to such partnership property as against the creditors of the co-partners. *Merrill v. Wilson*, xxix. 58.

35. In an assignment of a debtor's property in trust, for the benefit of creditors, the trustees covenanted, under seal, that they would pay proportionate dividends to such creditors as should sign the instrument of assignment, assenting thereto and stipulating that they would release certain claims:—*Held*, that a creditor whose name had been signed thereto, under proper authority, by an agent, who, at the same time, *without authority*, annexed a seal to the signature, was not so a party to the instrument as to maintain covenant broken against the assignees for his proportion of the dividends. *Baker v. Freeman*, xxxv. 485.

## ASSUMPSIT.

1. If a conveyance of an interest in land be made in the common form of a quitclaim deed, containing this stipulation;—“provided said grantee shall pay said grantor, or his assigns, twenty-two dollars annually from this date on demand”—until the happening of a certain event; and the grantee holds under the deed, but fails to make the annual payments when demanded; the grantor may recover the money by assumpsit. *Huff v. Nickerson*, xxvii. 106.

2. Where a railroad passes over parts of two counties, the railroad corporation may maintain an action of assumpsit in that county wherein they have an office which is “made the depository of the books and records of the company by a vote of the directors, and a place where a large share of the business is transacted;” although the company may at the same time have another office in the other county, where the residue of their business is transacted, and in which the treasurer and clerk reside. *A. & K. R. R. Co. v. Stevens*, xxviii. 434.

3. Any person injured by the misconduct of an officer may waive the tort and recover by an action of assumpsit, any money in the hands of a tort-feazor as the fruits derived from the wrongful act. *Richardson v. Kimball*, xxviii. 463.

4. The plaintiff, with others, were guarantors for the purchase of goods by A. of B. Afterwards, C. purchased A's stock, and informed one of the guarantors that he had assumed the debt due B. under the guaranty. Subsequently, the guarantors were called on for payment, and, on informing C., he repeatedly promised one of them, and also the attorney who had the demand for collection, that it should be paid. The guarantors paid B's claim, and the plaintiff paid his portion thereof and charged the same to C. who did not object to its justice.—*Held*, that C's undertaking was not within the statute of frauds, and that *indebitatus* assumpsit might be maintained. *Todd v. Tobey*, xxix. 219.

5. One of four owners of a vessel, cannot maintain assumpsit for the use



and charter of it, against the other three jointly. *Sturdivant v. Smith*, xxix. 387.

6. A creditor may maintain assumpsit on an implied promise, to recover of his debtor the amount he has paid the jailer for the debtor's board while imprisoned on the creditor's execution. *Plummer v. Sherman*, xxix. 555.

7. Where one tenant in common has received the rents and profits of the common property, he is accountable, in assumpsit, to a co-tenant for his share. *Buck v. Spofford*, xxxi. 34.

8. If, after pursuing the mode of the procedure prescribed by the statute, a part owner of a gristmill have made repairs beyond what was necessary to render the property serviceable, his lien will be good upon the profits for such part of the repairs as were necessary for that purpose; and if he have been reimbursed to that extent out of the joint profits, he will be accountable in assumpsit to his co-tenant for his share of the surplus, if any. *Buck v. Spofford*, xxxi. 34.

9. If a surety send his own money, by the debtor, to the officer who holds a precept upon the note, and the officer misappropriate the money, the surety, after having paid the debt to the creditor, may maintain assumpsit against the officer, and without a special demand, although the officer, when he received the money, was not notified to whom it belonged. *Stetson v. Howe*, xxxi. 353.

10. The law will not imply a contract, where an express contract is proved; nor where the parties cannot legally make an express contract. *Simpson v. Bowden*, xxxiii. 549.

11. Where an assignment, by the debtor to the creditor, of goods attached, (which had been sold by the officer on mesne process, and a note payable to himself on interest had been received in payment,) or the proceeds of the same, was accompanied by an order, directing the officer to deliver the goods or pay the avails of them to the assignee, from a payment of the *principal* according to order, it may be inferred that the officer accepted the order, though he at the same time refused to pay over the interest money, and claimed it for his own benefit; and upon such implied acceptance, the officer is liable to the creditor in assumpsit, for the interest money. *Gannett v. Cunningham*, xxxiv. 56.

12. Assumpsit for use and occupation, although the plaintiff's title be established, cannot be sustained, except upon proof, express or implied, that the defendant recognized such title and occupied under it. *Rogers v. Libbey*, xxxv. 200. *Howe v. Russell*, xli. 446.

12. If an imprisoned debtor assert his inability to support himself in prison, and that the creditor will be obliged to pay for his board, and the creditor does it, it is inferrable that the debtor assented to such payment, and promised the creditor to refund the same. *Spring v. Davis*, xxxvi. 399. *Willis v. Hobson*, xxxvii. 403.

13. Assumpsit cannot be maintained upon the contract of a corporation, who, through an agent, puts to it a seal. *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

14. An agreement signed by defendant to take and fill one share in the capital stock of a railroad company, renders him liable in assumpsit, to pay the assessments legally made upon that share. *B. B. R. R. Co. v. Irish*, xxxix. 44.

15. If an agent, acting under the direction of his principal, cuts timber by mistake partly upon the wrong township, which his principal receives and

disposes of, he can recover in assumpsit, of his principal, what he has been obliged to pay for damages in a suit for that trespass. *Drummond v. Humphreys*, xxxix. 347.

16. Assumpsit, by one tenant in common against his co-tenant, for use and occupation of the common property, will not lie on an implied promise; but when a tenant in common has received more than his share of the rents of the common property in money, or as bailiff of the other, assumpsit to recover his share may be maintained by his co-tenant. *Gowen v. Shaw*, xl. 56.

17. For a creditor's proportion of a sum of money found due from an executor, on the settlement of his account with the Judge of Probate, under the decree of that court, assumpsit will not lie. *Wass v. Bucknam*, xl. 289.

18. It seems a party cannot waive a tort and maintain assumpsit against the tort-feazor, except when the property has been converted into money or its equivalent. *Emerson v. McNamara*, xli. 565.

19. To maintain assumpsit on the money counts, proof, that any thing has been received by defendant as payment in lieu of money, as negotiable notes, specific articles, and even real estate, is sufficient. *Hall v. Huckins*, xli. 574.

20. A., owning a "claim" in C., agreed with B. to work it with him, and divide equally what should be taken therefrom. After having received a certain amount from the claim, B. left the country, without any settlement between the parties:—*Held*, that assumpsit for money had and received, would lie to recover of B. A's share of the gold, or its proceeds.—*Held, also*, evidence of the customs or usages among persons mining in company, in C., and also as to the reputation of a place, as being dangerous and unsafe for persons known to have money, was inadmissible. *APPLETON, J.*, dissenting. *Gilman v. Cunningham*, xlii. 98.

21. Where goods have been purchased and delivered, under an agreement to pay for them by a note with a surety, payable at a future time, if the note be not seasonably furnished, the seller may have an action of assumpsit immediately for the money. *Rice v. McLarren*, xlii. 157.

22. Money, paid by mutual mistake of fact, may be recovered back. *Starbird v. Curtis*, xliii. 352.

23. A mortgagee of goods agreed with the creditor of the mortgager, that he might attach and sell the goods, upon condition that the mortgage debt be first paid from the proceeds of the sale. Accordingly the goods were attached and sold by an officer:—*Held*, that assumpsit would lie against the officer to the amount of the debt. *Stevens v. Whittier*, xliii. 376.

24. Where one performs labor for the benefit of another, under his oversight and direction, the one who receives the benefit of the labor should pay for it, and a promise to do so may be inferred. *GOODENOW, J.*, dissenting as to the application. *True v. McGilvery*, xliii. 485.

25. Where, by the fault of the plaintiffs, they failed to obtain timber enough to pay notes given by them for a "permit," they cannot set up the deficiency against the payment of the notes or recover it on the money counts, either jointly or severally. *Taylor v. Pierce*, xliii. 530.

26. A lien upon the timber cut, having been agreed upon to secure the payment of the notes, no action for money had and received can be maintained while they remain unpaid in the hands of the payee. *Taylor v. Pierce*, xliii. 530.

See ACTION, 10, 11, 12, 50, 64, 66.

BILLS, &c. 114.

TRUSTS, 29.

## ATLANTIC AND ST. LAWRENCE R. R. CO.

1. This company, by its charter, is not exempted from the operation of the Act of 1842, c. 9. *Pratt v. A. & St. L. R. R. Co.*, XLII. 579.

2. Section 18, of the charter of this company, looks only to the future, and has no effect to annul or modify any thing contained in the Act of 1842, c. 9. *Pratt v. A. & St. L. R. R. Co.*, XLII. 579.

See COUNTY COMMISSIONERS, 1.

## ATTACHMENT.

- I. WHAT PROPERTY IS ATTACHABLE, AND WHEN.
- II. VALIDITY OF AN ATTACHMENT.
- III. HOW DEFEATED OR DISSOLVED.
- IV. PRIORITY OF ATTACHMENT.
- V. EFFECT, RIGHTS AND LIABILITIES, RESULTING FROM AN ATTACHMENT.

## I. WHAT IS ATTACHABLE, AND WHEN.

1. By the Act of 1829, c. 431, "the estate, right, title and interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate upon condition to be by him performed," is liable to be attached and held after, as well as before, the condition has been performed, where no deed was given prior to the attachment. *Whittier v. Vaughan*, XXVII. 301. *Whitmore v. Woodward*, XXVIII. 392. *Houston v. Jordan*, XXXV. 520.

2. Articles correctly designated as machines, in popular language, cannot be considered as exempted by the words of the statute, "the tools of any debtor;" hence, a peg machine is not exempted from attachment, or sale on execution. *Knox v. Chadborne*, XXVIII. 160.

3. The mortgagee of personal property, who has taken possession of the property, may, before foreclosure, waive his lien under his mortgage and attach the same upon the debt secured by it. *Libby v. Cushman*, XXIX. 429.

4. The interest of a mortgagee in land, prior to foreclosure, is not attachable. *Lincoln v. White*, XXX. 291. *McLaughlin v. Shepherd*, XXXII. 143. *Thornton v. Wood*, XLII. 282.

5. An officer may attach an indivisible article of property, though it far exceed the value he was directed by his precept to attach, and though the debtor had other descriptions of personal property liable to attachment, of a large amount. *Moulton v. Chadborne*, XXXI. 152.

6. A creditor acquires no title by an attachment and connected levy of land, of which, at the time of the attachment, the debtor had no title, but of which he had given a warranty deed to a third person, though the debtor, after the attachment and before the levy, obtained the title; said deed having been re-

corded prior to the levy, but subsequent to the attachment. *Crocker v. Pierce*, xxxi. 177.

7. An attaching creditor is chargeable with notice in the same manner, and with like effect, as a subsequent purchaser. *McLaughlin v. Shepherd*, xxxii. 143.

8. If the law prohibits the sale of any specific description of articles, they cannot be attached by judicial process. Such were spirituous or intoxicating liquors, under Act of 1851, c. 211. *Nichols v. Valentine*, xxxvi. 322.

9. Thirty hundred of hay for the use of a cow, and two tons for the use of ten sheep, are exempted, unrestrictedly as to time, from attachment and execution. *Kennedy v. Philbrick*, xxxviii. 135.

10. An attachment by virtue of a writ against an administrator, upon a claim disallowed by the commissioners of an insolvent estate, is illegal. *Thayer v. Comstock*, xxxix. 140.

11. The interest acquired by a judgment creditor in his levy on land, is not attachable during the year allowed by law for its redemption; nor will a levy of it as his property, during that time, prove available, although it may not be redeemed. *Kidder v. Orcutt*, xl. 589.

12. If the debtor is unmarried, or has no family depending on him for support, but is a boarder, or in such a situation that he can have no design to use "corn or grain" as food for himself or his family, these articles are not exempt from attachment. *Blake v. Baker*, xli. 78.

13. The exemption from attachment of "corn and grain," does not include those species of grain, which, by sales or exchanges, may indirectly contribute to the same end, when they are, by their nature and the general custom of the community, not suitable to be used in the making of bread, and are not so designed by the owner. *Blake v. Baker*, xli. 78.

14. A., on different days, executed three mortgages of a vessel to B. The first two were executed before the registry or enrollment of the vessel, and were duly recorded by the town clerk. Before the vessel was registered or enrolled, and the third mortgage executed and recorded in the collector's office, the vessel was attached:—*Held*, that the first two mortgages were valid, and that the vessel could not be legally attached upon mesne process, without first having paid or tendered the amount of the mortgage debts. *Foster v. Perkins*, xlii. 168.

15. The purchaser of an equity of redemption, sold on execution, has no attachable interest in the premises, during the year within which it may be redeemed. *Thornton v. Wood*, xlii. 282.

16. A right, acquired in any legal mode, to the conveyance of real estate, though resting entirely in contract, is attachable, and may be taken and sold on execution. *Neil v. Tenney*, xlii. 322.

17. An officer returned on a writ:—"By virtue of this precept, I have attached all the right, title, interest, estate, claim and demand of every name and nature that the within named defendant has to any and all real estate in the county of L.; and within five days, I put into the postoffice at B., directed to the register of deeds, at W., an attested copy of so much of this return as relates to said attachment, with the names of the parties in the writ, the sum sued for, the date of the writ, and the court to which the same is returnable," &c.:—*Held*, that the return was in its form sufficient. *Kendall v. Irving*, xlii. 339.

18. It is not necessary for the officer personally to carry the copy of his

return to the register's office; but it must be "lodged" there, or the attachment is not perfected. *Kendall v. Irving*, XLII. 339.

## II. VALIDITY OF AN ATTACHMENT.

- (a) GENERAL PRINCIPLES.
- (b) PERSONAL ESTATE.
- (c) REAL ESTATE.

### (a) *General principles.*

19. Where an officer made a return of an attachment upon a writ, against three defendants, in the following words:—"Penobscot, Dec. 28, 1836, at eleven o'clock, A. M., I have attached all the right, title and interest the defendant has, in and to any real estate in the county of Penobscot;"—*Held*, that the language was too vague and uncertain to create a lien by attachment, in the estate of either defendant. *Hathaway v. Larrabee*, XXVII. 449.

20. In determining what shall constitute an attachment, regard must be had to the nature of the property, its situation, the expenses of removal, and to the kind of possession which the owner retains of it. *Bicknell v. Trickey*, XXXIV. 273.

21. If, after an attachment of an equity of redemption, the mortgager convey the premises to the mortgagee by an absolute deed, in consideration of the notes secured by the mortgage and other land, such grantee cannot hold the estate which may be duly levied on by virtue of the attachment, against such attaching creditor of the mortgager. *Whitcomb v. Simpson*, XXXIX. 21.

22. Such attachment, after the mortgage has been thus canceled, is made available only by a levy upon the land. *Whitcomb v. Simpson*, XXXIX. 21.

### (b) *Personal estate.*

23. It is the duty of an officer to be present at the place where wood is situated, and take it into his possession, in order to justify him to return that it has been attached. *Darling v. Dodge*, XXXVI. 370.

24. Where every thing is done to constitute and to show an attachment, and the property is of such a character, that it cannot be removed immediately, it may be left where taken, and the attachment will continue effectual and valid, by filing the copy and certificate required by the statute at the town clerk's office. *Darling v. Dodge*, XXXVI. 370.

See ATTACHMENT, 14.

### (c) *Real estate.*

25. An attachment of real estate, by virtue of a writ containing the general money counts, together with a count on an account annexed, which account annexed was expressed as follows:—"S. W. to J. W., Dr. To balance due on account, and interest, \$1500. Apr. 1, 1841,"—with no specifications annexed at the time of the attachment, is invalid. *Saco v. Hopkinton*, XXIX. 268.

26. Technical accuracy or the most appropriate phraseology is not to be expected in officers' returns. They will be sufficient if the purpose be clearly made known by the language used. *Lambard v. Pike*, XXXIII. 141.

27. An officer returned that he had attached "as property of the defendants, all the right, title and interest that they have to a grist mill, standing in the town of M."—*Held*, if it appear that the defendants had any interest in one grist mill in that town, the attachment was valid to hold that mill, unless it appear, that they had also an interest in some other grist mill in the same town. *Lambard v. Pike*, xxxiii. 141.

28. An attachment of land creates no lien, as against a subsequent purchaser, unless the attaching officer certify to the register of deeds, *all* the sums sued for and included in the creditor's judgment. *Bacon v. Denning*, xxxiii. 171.

29. An officer's certificate, filed in the registry of deeds, stating the *ad damnum*, mentioned in the writ, instead of the "sum sued for," creates no lien; nor unless it mentions the Court to which the writ is returnable. *Nash v. Whitney*, xxxix. 341.

See ACTION, 19, 20.

ATTACHMENT, 17, 19.

EXECUTION, 53.

### III. HOW DEFEATED OR DISSOLVED.

(a) NEGLIGENCE OR MISDOINGS OF THE OFFICER.

(b) AMENDMENTS.

(c) OTHERWISE.

(d) LAPSE OF TIME.

(a) *Negligence or misdoings of the officer.*

30. An officer's certificate, filed in the registry of deeds, stating the *ad damnum*, instead of the "sum sued for" in the writ, creates no lien; nor unless it mentions the court to which the writ is returnable. *Nash v. Whitney*, xxxix. 341.

(b) *Amendments.*

31. If, in an action of assumpsit, another person be made a co-plaintiff, by amendment of the writ by leave of court, the attachment of property upon the writ is thereby dissolved. *Moulton v. Chapin*, xxviii. 505.

32. Bail taken on mesne process is discharged by a subsequent increase of the *ad damnum*. *Langley v. Adams*, xl. 125.

(c) *Otherwise.*

33. Where a creditor attaches the estate of his debtor held in common with others, that cannot prevent the other part owners from procuring a legal partition of the estate. Nor will such partition vacate or destroy the attachment, which will remain as a lien on that part of it set off to the debtor. *Argyle v. Dwinel*, xxix. 29.

34. The attachment of property upon mesne process is not dissolved by the death of the debtor, unless his estate shall be represented insolvent by the executor or administrator. *Hapgood v. Fisher*, xxx. 502.

35. If the attorney abandons the suit in which an attachment is made, the attachment is necessarily vacated. *Wheeler v. Nichols*, xxxii. 233.

36. Where goods have been attached, and put into the charge of a keeper by the officer, and the keeper abandons the possession, the attachment is dissolved. *Wheeler v. Nichols*, xxxii. 233.

37. Upon property attached, and delivered by the officer into the possession of receiptors, who promised to pay a sum certain or re-deliver to him the property, the officer's lien is dissolved; and the property is liable to be attached at the suit of another creditor of the owner. *Waterhouse v. Bird*, xxxvii. 326. *Stanley v. Drinkwater*, xliii. 468.

38. A. attached B's real estate, afterwards, B. obtained his discharge in bankruptcy, under the Act of 1841. A. duly filed, in the Court against said bankrupt, one of the notes declared on;—*Held*, that this should be regarded as an abandonment or waiver of the attachment. *Bowley v. Bowley*, xli. 542.

39. So, too, the purchase of property by the attaching creditor, taking a bill of sale for it from the debtor, dissolves the attachment. *Stanley v. Drinkwater*, xliii. 468.

See BANKRUPTCY, 40.

(d) *Lapse of time.*

40. Where an attachment was made on mesne process, the action duly prosecuted to judgment and execution; and where, at the next succeeding term of the court, "on motion of the plaintiff, it was ordered, that the judgment and execution aforesaid be annulled, and that the execution aforesaid be returned into the clerk's office; and the action was thereupon brought forward to" that term:—*Held*, that the attachment was dissolved. *Leighton v. Reed*, xxviii. 87.

#### IV. PRIORITY OF ATTACHMENT.

41. Where an attachment was made on mesne process, the action duly prosecuted to judgment and execution; and where, at the next succeeding term of the court, "on motion of the plaintiff, it was ordered, that the judgment and execution aforesaid be annulled, and that the execution aforesaid be returned into the clerk's office; and the action was therefore brought to" that term;—*Held*, that the attachment was dissolved; and that another attachment, made after the time when the first suit was brought forward, and before the last judgment, had the priority. *Leighton v. Reed*, xxviii. 87.

#### V. EFFECT, RIGHTS AND LIABILITIES, RESULTING FROM AN ATTACHMENT.

- (a) INTEREST OF THE DEBTOR.
- (b) RIGHTS AND DUTIES OF THE OFFICER.
- (c) POWERS AND LIABILITIES OF A BAILEE OR RECEIPTOR.
- (d) IN GENERAL.

(a) *Interest of the debtor.*

42. If the property attached by an officer has gone back into the hands of the debtor, he has no claim upon the officer for it. *Moulton v. Chapin*, xxviii. 505.

43. After a seizure of the vessel and cargo for a supposed breach of the law, and after confession by the owner, and while the property is in custody of the law under the seizure, he still has such an interest as would enable him to mortgage the same to some of his creditors, as against others, who should attach after final restoration by the government. *Mitchell v. Cunningham*, xxix. 376.

44. After an attachment of an equity of redeeming mortgaged land, no conveyance made by the debtor can lessen the creditor's rights. *Abbott v. Sturtevant*, xxx. 40.

45. An attachment does not interrupt the seizin of the debtor. *Brown v. Williams*, xxxi. 403.

46. The owner of personal property, attached upon a writ against him, and actually retained by the officer or his bailee, may transfer his interest therein either absolutely or in mortgage, subject to the attachment-lien. *Wheeler v. Nichols*, xxxii. 233.

47. Articles, attached on a writ, which are liable to perish or waste or be greatly reduced in value by keeping, or which cannot be kept without great expense, may be restored to the debtor, upon his giving bond in compliance with 114th c. R. S., 1841. *Snow v. Cunningham*, xxxvi. 161.

(b) *Rights and duties of the officer.*

48. If neither creditor nor debtor has any claim upon an officer for property attached by him, which has gone back into the hands of the debtor, the officer cannot maintain any action upon the receipt. *Moulton v. Chapin*, xxviii. 505.

49. It is not indispensable that the officer's deed of an equity of redemption should be delivered on the day of sale. *Abbott v. Sturtevant*, xxx. 40.

50. If it be delivered so soon afterward, that it may be regarded as a part of the sale-transaction, the deed, and the purchaser's right under it, will have relation back and take effect from the time of sale. *Abbott v. Sturtevant*, xxx. 40.

51. An officer is not bound to take a receipt for property attached; and if he should do it, without consent of the creditor, he would be liable, at all events, for the property. *Moulton v. Chadborne*, xxxi. 152.

52. Neither the request of the debtor, that the officer will attach other property, instead of that already attached; nor the offer of a third person to deposit money, for the officer's security, as an inducement to discharge the property attached; nor the mere offer of the debtor to have an appraisement of the attached property, imposes any duty upon the officer. But it is his duty to attach personal instead of real estate, if so directed. *Moulton v. Chadborne*, xxxi. 152.

53. A vessel, in good repair, at the port of the owner's residence, is not property, of which an appraisal may be had, under R. S., 1841, c. 114, §§ 53 to 57. *Moulton v. Chadborne*, xxxi. 152.

54. If an officer, having a writ for service, offer the summons to the defendant, who refuses to receive it, and the officer thereupon throws it down, he may rightfully return that he delivered the summons, or he may return the facts specifically, and they will be held as a delivery. *Fuller v. Kenney*, xxxii. 334.

55. The approval by the plaintiff, as to the ability of the person taken as



receptor, does not exonerate the officer from effort to find the property, or from the duty of bringing a suit upon the receipt. *Allen v. Doyle*, xxxiii. 420.

56. Where certain articles, which are liable to perish, &c., are attached on a writ, and are subsequently attached, together with additional articles, by the same officer, upon a writ in favor of another creditor, such additional articles, before they can be restored to the debtor, must be appraised and bonded separately from those attached on the first writ. *Snow v. Cunningham*, xxxvi. 161.

57. The property in goods, acquired by the officer attaching them on mesne process, is merely a special one. *Nichols v. Valentine*, xxxvi. 322. *Fuller v. Loring*, xlii. 481.

58. An attachment of liquors, the sale of which is prohibited by law, confers no special property upon the officer; and he can maintain no action for a forcible taking them from his possession, even against one having no right or authority. *Nichols v. Valentine*, xxxvi. 322.

59. The inability of an officer to deliver property which he had attached on a writ, does not dispense with the rule, that a demand of the property should be made within thirty days from the judgment by an officer holding the execution. *Pearsons v. Tincker*, xxxvi. 384.

60. An officer is not bound to attach the goods of a debtor, out of his possession, unless specially ordered. And if specially ordered to attach specific property of a debtor not in his possession, his duty is to do so, although he held in his hands older precepts against the same debtor, with general orders to attach all his property. *Weld v. Chadbourne*, xxxvii. 221.

61. The law will imply no indemnity to an officer for attaching goods not in the possession of the debtor, without special orders. But he is required to use diligence and good faith; and if he knows of property belonging to the debtor, but not in his possession, he is bound to attach it under general orders. *Weld v. Chadbourne*, xxxvii. 221.

62. An officer who sells property on mesne process, without the consent of the creditor and debtor, or otherwise than by the method prescribed in c. 114, § 53, R. S., 1841, becomes a trespasser *ab initio*. *Ross v. Philbrick*, xxxix. 29.

63. And the pendency of the action, on which such property was attached, interposes no obstacle to an immediate suit by the owner. *Ross v. Philbrick*, xxxix. 29.

64. It is the official duty of an officer, to keep the property attached for thirty days after judgment, and to deliver it upon demand to any officer having the execution with authority to receive it, although he did not continue to be an officer. *Smith v. Bodfish*, xxxix. 136.

(c) *Powers and liabilities of a bailee or receptor.*

65. As a general rule, the receptor of property attached, may be discharged from his liability, by proof that the property, when attached, was not owned by the debtor, but by a third person into whose hands it has been delivered. *Pen. B. Corp. v. Wilkins*, xxvii. 345. *Drew v. Livermore*, xl. 266.

66. But where the receipt stipulated, that "this receipt shall be conclusive evidence against me, as to the receipt of said property, its value and my

liability under all circumstances, to said officer," the receiptor is estopped to deny that it was the property of the debtor; and the officer cannot set up the defence, that the property did not belong to the debtor but to the receiptor. *Pen. B. Corp. v. Wilkins*, xxxvii. 345. *Drew v. Livermore*, xl. 266.

67. If an attaching officer be under no liability to the creditor for the appropriation of the property attached to the payment of the debt, the receiptor will be discharged. *Pen. B. Corp. v. Wilkins*, xxvii. 345.

68. If a part of a vessel be attached, and the officer takes a receipt therefor, and she is sent to sea, the receiptor is not liable to the officer for any earnings of the vessel. *Richardson v. Kimball*, xxviii. 463.

69. If there be good cause of action against a receiptor when the action was commenced, but the right of action had ceased with the preservation of the attachment afterwards, nominal damages may be recovered; but where no cause of action existed against the receiptor when the suit was commenced, the suit must fail. *Moulton v. Chapin*, xxviii. 505.

70. It is no defence to an action upon a receipt for property attached, that subsequently to the expiration of the thirty days after judgment, the original debtor died, unless, in the probate court, his estate was represented insolvent. *Hapgood v. Fisher*, xxx. 502.

71. And although such receipt was taken by direction of the creditor, and the officer's liability discharged, the creditor is equitable owner of the receipt and can enforce it in the name of the officer. *Hapgood v. Fisher*, xxx. 502.

72. If a receiptor of attached goods give his written contract to pay the officer a specified sum or restore the articles, therein expressly admitting the goods to be of that value, in an action upon the contract, he will not be permitted to prove, that the goods were therein overvalued; or that such property had greatly depreciated in price; or that he offered other goods of the same denomination. *Smith v. Mitchell*, xxxi. 287.

73. Receiptors for property attached in a suit, wherein judgment has been rendered against the defendant, cannot impeach it. Even if there were no judgment, the officer is accountable for the property; and the receiptors, being merely his bailees, are accountable to him. *Brown v. Atwell*, xxxi. 351. *Drew v. Livermore*, xl. 266.

74. It is not legally inconsistent that the same bailee should act to keep possession, both for the attaching officer and for a purchaser under the owner. *Wheeler v. Nichols*, xxxii. 233.

75. When the promise contained in a receipt for property attached is, that the property shall be delivered "on demand," the demand is a condition precedent. And the inability of the receiptor to redeliver the property, does not waive the necessity for a demand, in order to fix his liability. *Bicknell v. Hill*, xxxiii. 297.

76. A commission merchant may maintain replevin against an attaching officer, although he may have consented to become keeper of the goods for the officer. *Sewall v. Nichols*, xxxiv. 582.

77. Where property is seized on execution, and the officer returns that further service of the execution is suspended by reason of a former attachment when no such attachment is in force; and afterwards takes a receipt for such property, to be re-delivered on demand, or within thirty days from the rendition of judgment in the first suit, no action can be maintained on such receipt. *Stanley v. Drinkwater*, xliii. 468.

(d) *In general.*

78. A levy of an execution, seasonably made after judgment, has relation to the time of the attachment. *Brown v. Williams*, xxxi. 403.

79. The lien, created by an attachment of real estate, is not limited to the amount of the *ad damnum*; but is for the security of the final judgment which may be recovered, and legal costs, incident to its enforcement and collection. *Searle v. Preston*, xxxiii. 214.

80. Prior to the Act of 1847, c. 21, the interest which an obligee or his assignee has in a conditional bond for the conveyance of land, was to be made available to creditors by a sale of it on execution. *Houston v. Jordan*, xxxv. 520.

81. If, after an attachment made in a suit against the obligee or his assignee, a conveyance pursuant to the bond shall have been made to the person whose interest is attached, then, by the Act of 1847, aforesaid, the creditor may levy and retain the validity of the attachment; but otherwise, if the conveyance shall have been made to a third person. And whatever rights, under such an attachment, are acquired by an auction purchase, can be vindicated only by process in equity. *Houston v. Jordan*, xxxv. 520.

82. The right of a plaintiff, arising from an attachment, is not an absolute right. *Bowley v. Bowley*, xli. 542.

83. If an attachment be dissolved by the acts of the parties, without the knowledge of the attaching officer, who makes a seizure upon an execution subject to the attachment, and suspends further service for that cause, no rights will be secured to the creditor under R. S. of 1841, c. 117, § § 33 and 34, beyond those which would have existed had the officer known, when he made the seizure, that the attachment had been dissolved. *Stanley v. Drinkwater*, xliii. 468.

## ATTORNEY.

1. Verbal directions from the constituent to the attorney can confer no new authority, nor enlarge that contained in the power of attorney. *Spofford v. Hobbs*, xxix. 148.

2. A ratification of an unauthorized conveyance of land by a proprietor's attorney, must be by an instrument under seal. The taking back of a mortgage and notes by the proprietor, without the mortgage referring specifically to the deed of the same premises, or containing any thing inconsistent with the attorney's want of authority, is not a ratification; nor does it estop the mortgagee from denying that the title passed to the mortgager, by the attorney's deed. *Spofford v. Hobbs*, xxix. 148.

3. Where a power of attorney authorized the attorney to sell certain lands, "for the purpose of making actual settlements thereon," and to sign, seal and deliver "legal and sufficient deeds, with the several covenants, and a general warranty," and in "fee simple;"—*Held*, that the attorney was clothed with discretion to judge, whether the purchaser intended to purchase for purposes of settlement; and there being no fraud, a conveyance made under the power was valid, although the land was purchased on speculation. *Spofford v. Hobbs*, xxix. 148.

4. Where a proprietor, who had sold certain lots, and contracted to sell some other lots, granted a power, authorizing his attorney to "collect and receive all sums of money due to him for said lands from purchasers, and to execute all such contracts as the sales may require:"—*Held*, that the power did not authorize the attorney to make new contracts for the sale of other lands. *Calef v. Foster*, xxxii. 92.

5. A power of attorney ceases at the death of the principal. *Wheeler v. Haskins*, xli. 432.

## ATTORNEYS AND COUNSELORS.

### I. AUTHORITY OF AN ATTORNEY.

### II. DUTY AND LIABILITY OF AN ATTORNEY.

### III. LIEN OF AN ATTORNEY.

### I. AUTHORITY OF AN ATTORNEY.

1. Where a practising attorney, in the transaction of business, takes a negotiable note to his principal, and it is suffered to remain in the possession of the attorney many years, the law presumes that he has authority to receive payments on it. *Patten v. Fullerton*, xxvii. 58.

2. And if the consideration of the note to the principal was property sold, belonging to an infant to whom he was guardian, the power of the attorney to receive payments on the note would not cease with the guardianship of the principal. *Patten v. Fullerton*, xxvii. 58.

3. And were the principal an unmarried female at the time the note was made, and she afterwards married, the authority of her attorney would be continued with the assent of her husband. *Patten v. Fullerton*, xxvii. 58.

4. Generally, payments made on such note to the attorney in specific articles, would not bind the principal. But if one of several payments in specific articles to the attorney, be received by the principal, and the note is still suffered to remain in the possession of the attorney, and no objection is made to the attorney or the debtor, such payments would go in discharge of the note, the same as if they had been money. *Patten v. Fullerton*, xxvii. 58.

5. An attorney at law, unless specially authorized, cannot discharge an execution in favor of his client, without payment of the whole amount. *Jewett v. Wadleigh*, xxxii. 110.

6. The execution creditor would be entitled to collect of the debtor at least that portion of an execution thus not paid. *Jewett v. Wadleigh*, xxxii. 110.

7. Where an execution debtor, having made an agreement with the creditor's attorney to pay certain securities lodged in the attorney's possession, as a full discharge of the execution, though amounting to a part only of the sum due, contracted to pay the balance of the execution thus uncovered by securities, in case they were not punctually met at their respective pay-days, such a contract is *nudum pactum*. *Jewett v. Wadleigh*, xxxii. 110.

8. The remarks of counsel, in the progress of a cause, are not to be view-

ed as an admission or agreed statement, by which the rights of his client should be determined. *McKeen v. Gammon*, xxxiii. 187.

9. The making of a contract, in behalf of the creditor, for extending the time, for a principal in a poor debtor's bond, to make his disclosure, beyond the six months, is within the powers pertaining to his attorney, appointed to act for him at the disclosure. *Phillips v. Rounds*, xxxiii. 357.

10. A party will not be bound by a contract, entered into on his behalf, by his attorney at law, without previous authority or subsequent ratification. *Ireland v. Todd*, xxxvi. 149.

11. Thus, where an attorney obtained possession of mortgaged premises, but, before foreclosure expired, the money due was paid, without deducting the rents and profits, and the attorney gave an obligation in the name of the mortgagee to repay that amount, when ascertained by referees agreed upon; in an action on the award, — *Held*, that the mortgagee was not bound. *Ireland v. Todd*, xxxvi. 149.

12. An attorney at law, in virtue of "his general authority as an attorney at law, to collect stampage for the plaintiffs," cannot execute a replevin bond in their name. *Nar. L. Propr's v. Wentworth*, xxxvi. 339.

13. But a prosecution, by the plaintiffs, of the replevin suit, constitutes a ratification, and discharges the interest of the attorney. *Nar. L. Propr's v. Wentworth*, xxxvi. 339.

14. Where an attorney at law agreed with the plaintiff, that if he would permit him to commence a suit in his name and the action failed, he, the attorney, would pay all costs thereon; and such suit was commenced and the plaintiff was compelled to pay the bill of costs: — *Held*, that the agreement was illegal, and could not be enforced. Whether compensation for services rendered under such agreement is recoverable, *quære*. *Low v. Hutchinson*, xxxvii. 196.

15. It is a general rule, that special authority to bring a suit must be shown by an attorney. *Prentiss v. Kelley*, xli. 436.

16. Where the plaintiff's appearance is seasonably called for, the attorney's employment must be shown; but if not called for at the first term, his employment will be presumed. *Prentiss v. Kelley*, xli. 436.

## II. DUTY AND LIABILITY OF AN ATTORNEY.

17. Attorneys, counselors and solicitors are not at liberty to divulge communications made to them, in reference to their professional employment, without the assent of their clients. The law will not compel, and the courts will not permit it. *McLellan v. Longfellow*, xxxii. 494. *Sargent v. Hampden*, xxxviii. 581.

18. To entitle a communication to this privilege, it is not essential that it should be made under any special injunction of secrecy, or that the client should understand the extent of the privilege; but it extends to all communications made with a view to professional employment. *McLellan v. Longfellow*, xxxii. 494.

19. Declarations made to any attorney with reference to his employment, are privileged, although the attorney declines the engagement. *Sargent v. Hampden*, xxxviii. 581.

## III. LIEN OF AN ATTORNEY.

20. The attorney of the creditor, who recovers a judgment, has a lien upon it, and upon the execution, which may issue thereon, for his fees and disbursements in the suit; but such lien does not attach until final judgment. *Gammon v. Chandler*, xxx. 152. *Hobson v. Watson*, xxxiv. 20.

21. Such a lien is effectual, though the debtor had no notice that the attorney relies upon it, or even that an attorney had been employed, and it cannot be defeated by the client. *Gammon v. Chandler*, xxx. 152. *Hobson v. Watson*, xxxiv. 20.

22. The attorney's lien is an ownership in the property of the judgment, and of the same efficiency, as would be created by an assignment of the judgment for collateral security, and entitles him to the same remedies for its enforcement. *Hobson v. Watson*, xxxiv. 20.

23. The lien, which an attorney had upon the original judgment, attaches to a relief bond given by the debtor, and it cannot be defeated by the creditor's discharge of the bond. *Hobson v. Watson*, xxxiv. 20.

24. The property in a relief bond belongs to the several owners of the judgment, and any such owner may use the name of an obligee for the collection of it. *Hobson v. Watson*, xxxiv. 20.

25. In order that the surety in a poor debtor's relief bond should be held liable for the attorney's lien on the judgment and execution, upon which the bond arose, notwithstanding a discharge by the judgment creditor, if it be necessary that the surety have knowledge of the lien, *it seems*, that such knowledge, acquired pending the suit, is sufficient. *Hobson v. Watson*, xxxiv. 20.

26. Upon a judgment vacated by a judgment in review, no action can be maintained to secure a lien for his costs, by the attorney who obtained it. *Dunlap v. Burnham*, xxxviii. 112.

## AUCTION AND AUCTIONEER.

1. Where a corporation is authorized by law to sell logs for the tolls at public auction, on grounds of public policy, such a sale will pass a valid title to the purchaser, although the proceedings of the officers of the corporation, in relation to the custody of the articles and to the sale, are irregular and defective. *Hunter v. Perry*, xxxiii. 159.

2. A boom corporation having such powers, collected logs, and after those belonging to certain owners had been redeemed and taken away, proceeded to sell at auction all the residue, comprising logs of divers marks and values and ownerships:—

*Held*, that a valid title passed to the purchaser, although the proceedings of the officers of the corporation, pertaining to the taking and keeping of the logs and to the sale were irregular; and although they sold more of the logs of each owner than were necessary to pay the tolls and expenses due upon the logs of such owner; and although the sale was made collectively of all the logs in the boom, without any regard to ownership, or to the respective

amounts due upon them; and although the sale was had, not on the day prescribed in the charter, but on a subsequent day, by an adjournment not provided for in the charter. *Hunter v. Perry*, xxxiii. 159.

3. Auction sales are within the statute of frauds. But the auctioneer is the agent of both parties, and is bound to act for them both, with equal fidelity; and his entry of the name of the purchaser on his book or memorandum containing the particulars of the contract, is a sufficient signing within the statute. *Pike v. Balch*, xxxviii. 302. *O'Donnell v. Leeman*, xliii. 158.

4. Property exposed at auction sale does not become vested in the highest bidder by being fairly knocked off to him, until the requirements of the statute are fulfilled. *Pike v. Balch*, xxxviii. 302.

5. An auctioneer, after he has knocked off property, may re-open the sale, if he recognizes a higher bid. *Pike v. Balch*, xxxviii. 302.

See ACTION, 82.

NOTICE, &c., 6.

## AUDITORS.

See ACCOUNT, 3.

## AWARD.

See ARBITRATION.

## BAIL.

Bail taken on mesne process is discharged by a subsequent increase of the *ad damnum*. *Langley v. Adams*, xl. 125.

## BAILMENT.

1. The owners of steamboats, as common carriers, are bound not only to the highest degree of care and diligence, but as insurers against every peril, not arising from the act of God, as tempests, storms, lightning and extraordinary convulsions of the elements, or acts of a public enemy. Hence, the loss of a shipment at sea, by collision, is not excusable. *Plaisted v. B. & Ken. S. Nav. Co.*, xxvii. 132.

2. The common law liability of a common carrier, may be restricted by a notice from him brought home to the knowledge of the customer, as to the extent of the liability to be borne by the carrier. But no notice or contract can exonerate a common carrier from liability for damage, occasioned by his negligence or misconduct. *Sager v. P. S. & P. & E. R. R. Co.*, xxxi. 228.

3. Such notices will not exempt carriers from responsibility for losses occasioned by a defect in the vehicle or machinery used for transportation. *Sager v. P. S. & P. & E. R. R. Co.*, xxxi. 228.

4. A carrier will be liable for disobedience of directions given and assented to respecting the mode of conveyance. *Sager v. P. S. & P. & E. R. R. Co.*, xxxi. 228.

5. If the owner stipulate with the carrier to take upon himself the risk of "all damages that may happen" to the goods in the course of transportation, such stipulation will not exonerate the bailee from losses resulting from his negligence or misconduct. Such stipulation, however, would cast upon the owner the burden of proving that the damage was so occasioned. *Sager v. P. S. & P. & E. R. R. Co.*, xxxi. 228.

6. The risk of a common carrier terminates as soon as the goods have arrived at their place of destination, and are deposited, and no further duty remains to be done under the contract to carry them. *Stone v. Waitt*, xxxi. 409.

7. When the transit is ended, and the delivery is either completed, or waived by the owner; or if the consignee take charge of the goods before they have arrived at the extreme or ultimate place of delivery, the carrier's risk will then terminate. *Stone v. Waitt*, xxxi. 409.

8. An inn-keeper's liability for goods and chattels, stolen or injured at his inn, extends beyond his own fidelity and that of his servants. *Shaw v. Berry*, xxxi. 478.

9. He is responsible for well and safe keeping, and is bound to keep the goods and chattels, so that they shall be actually safe, except against inevitable accidents, and the acts of public enemies, and of the owners of the property or their servants. *Shaw v. Berry*, xxxi. 478.

10. A bailee of personal property, injured while in his possession, may recover the amount of the injury, in an action in his own name, against a wrongdoer, and hold the balance beyond his own interest, in trust for the general owner. *Little v. Fossett*, xxxiv. 545.

11. The special owner of property, having it in his possession, may recover its value in a suit against a common carrier by whose negligence it has been lost. *Moran v. Port. S. P. Co.*, xxxv. 55.

12. A bailee without reward is answerable only for fraud, or that gross neglect which is evidence of fraud. But where the bailor knows the habits of the bailee and the place and the manner in which the goods are to be kept, the law presumes his assent that his goods shall be thus treated, and if lost or damaged, he can maintain no action therefor. *Knowles v. A. & St. L. R. R. Co.* xxxviii. 55.

13. A bailee of goods upon which labor is to be performed for a sum of money, and they are not to be changed into something essentially different in their character, has only a special property in them, which is terminated by the performance of his labor, and a delivery to the general owner. *Morse v. And. R. R. Co.*, xxxix. 285.

14. And when such bailee has completed his work, and delivered the



goods to a common carrier for the general owner, and paid for their carriage, and the goods are lost or damaged, he can maintain no action against the carrier therefor. *Morse v. And. R. R. Co.*, xxxix. 285.

15. Common carriers by stage are responsible for the safety of their passengers, when an injury occurs by their neglect, such passengers being in the exercise of ordinary care, and in no way contributing to the injury. *Keith v. Pinkham*, xliii. 501.

16. If an agent of a stage line requests a passenger to take an inside seat, or he will remain outside at his peril; this does not excuse the driver from the use of ordinary care. Such passenger assumes only the peculiar risk of his exposed situation, but not that resulting from the negligence of the driver. *Keith v. Pinkham*, xliii. 501.

## BANK.

1. The directors of a bank, having the control of its financial affairs, may direct the assignment or transfer of a note belonging to the bank. *Stevens v. Hill*, xxix. 133.

2. Where the directors of a bank, just before the expiration of its charter, transfer property to trustees for the benefit of the stockholders, all interest which the corporation had in the property terminates, the legal interest vests in the trustees, and the beneficial interest in the stockholders. *Stevens v. Hill*, xxix. 133. *Cooper v. Curtis*, xxx. 488.

3. The assent of a bank, that a note may be sued in its name for the benefit of a third person, may be inferred from the acts of its officers, and without a vote of its directors. *Lime Rock Bank v. Macomber*, xxix. 564.

4. Where the charter of a bank is surrendered and accepted, but its corporate power is continued for a limited time, for the purpose of closing its affairs, the directors may appoint a cashier under the general banking law. *Cooper v. Curtis*, xxx. 488.

5. If the directors were chosen and recognized by the proprietors of the bank as the only board, and they appointed the cashier, who acted under that appointment by their direction, it is not competent for the debtors of the bank to avoid their contracts, on the ground that the directors were not chosen strictly according to the provisions of the statute. *Cooper v. Curtis*, xxx. 488.

6. A trustee, created by a bank, may maintain a suit in his own name on a note payable to the bank and indorsed to him while the corporate capacity existed, though the action may not be commenced till afterward. *Cooper v. Curtis*, xxx. 488.

7. The dissolution of a corporation, by Act of the Legislature, deprives it of its corporate existence. And a judgment rendered against it, after such dissolution is erroneous. *Merrill v. Suffolk Bank*, xxxi. 57. *Rankin v. Sherwood*, xxxiii. 509.

8. The taking of interest in advance upon loans made by a bank, is within the well established rules of banking. But after a note given to the bank has become payable, and in no manner taken up or renewed, the bank can-

not lawfully take upon it a rate of interest exceeding six per cent. per annum. *Ticonic Bank v. Johnson*, xxxi. 414.

9. Where, in discharge of a pre-existing debt, several notes are given, containing a usurious rate of interest, reckoned upon the amount of the debt, each note is held to contain its proportional share of the illegal interest. *Ticonic Bank v. Johnson*, xxxi. 414.

10. Upon such notes, payments were made, partly in cash, and partly in notes given in substitution:—*Held*, that each of the substituted notes contained a portion of the usurious interest. *Ticonic Bank v. Johnson*, xxxi. 414.

11. And where the final balance of all the notes was paid by a new note, which also reserved usurious interest;—*Held*, that the last note did not reserve within itself, the amount of the illegal interest which had been included in all the preceding notes, and that such amount could not legally be deducted from it. *Ticonic Bank v. Johnson*, xxxi. 414.

12. Upon the failure of any bank of this State to pay its bills on demand, the private property of each shareholder, to the amount of his stock, is liable to be levied upon the execution recovered against the bank. But the judgment must have been recovered while the bank had a legal existence. *Ran-kin v. Sherwood*, xxxiii. 509.

13. The official bond, given by a bank cashier, with the condition required by the statute for his doings, and with condition for additional acts, though invalid as a statute bond, is valid at common law, if such additions require no immoral or unlawful act. *Franklin Bank v. Cooper*, xxxvi. 179.

14. The official bond of a cashier, does not become valid until accepted. Though the law provides, that in no case shall such a bond be signed by a director, yet such a bond, signed by one as surety while he was a director, will be valid against him, if it was not accepted until after he had ceased to be a director. *Franklin Bank v. Cooper*, xxxvi. 179.

15. The bond of a bank cashier, framed to cover past as well as future delinquencies, will be invalid against a surety, if his name was procured at the desire of the directors, they knowing that past defalcations existed, of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it. *Franklin Bank v. Cooper*, xxxvi. 179. *Same v. Stevens*, xxxix. 532. *Same v. Cooper*, xxxix. 542.

16. The capital stock of a bank can only be assessed once, and that upon the stockholders to the value of their shares; but property composing no part of its capital, so held by a bank, that no other person or corporation could be legally taxed for it, as owner, is liable to be assessed to such bank. *Augusta Bank v. Augusta*, xxxvi. 255.

17. Shares of a railroad corporation, which it may hold by an absolute title, may rightfully be assessed to the bank; and parol evidence is inadmissible to prove that the absolute title was intended to be a conditional one. *Augusta Bank v. Augusta*, xxxvi. 255.

18. The declarations of the cashier, giving information as to a past transaction of the bank, though such transaction pertained to his own department of the business of the bank, are not admissible against the bank.—*Hence*, where a surety on a note to the bank, having in his possession the property of the principal, with which he might have secured himself by attachment, sent his agent, after the pay-day, to inquire of the bank whether the note had been paid; to which inquiry, the cashier, in the banking room, declared that it had been paid; whereupon the surety, relying upon that information, sur-

rendered the property to the principal, who soon afterwards failed, and continued to be insolvent: In a suit by the bank against the surety; — *Held*, that the declaration made by the cashier was inadmissible as evidence against the bank. Per SHEPLEY, C. J., and TENNEY and HOWARD, J. J. — RICE and APPLETON, J. J., dissenting. *Franklin Bank v. Steward*, XXXVII. 519.

19. An individual stockholder has no authority to defend an action against a banking corporation, after the charter has been repealed and the effects have gone into the hands of receivers. *Merrill v. Shaw*, XXXVIII. 267.

20. A covenant by the vendee of certain bank shares, that he would indemnify and save harmless his vendor from any and all liabilities he may have incurred as stockholder, or from any loss or damage he may sustain from or on account of that capacity, except the depreciation of stock, is limited to such legal liabilities which he had incurred, or the loss and damage which he might sustain, growing legitimately out of his capacity as stockholder. *Merrill v. Shaw*, XXXVIII. 267.

21. For payments made by their cashier on checks overdrawn, the bank may maintain an action against the drawer. *Franklin Bank v. Byram*, XXXIX. 489.

22. By § 49 of Bank Act, passed in 1841, no bank in this State is permitted to take any greater rate of interest or discount, on any note, draft or security, than at the rate of six per cent. a year. And banking corporations are within the provisions of the statute against usury; and when, in discounting paper, a greater rate than the legal interest is taken or reserved, such excess only can be avoided. *Veazie Bank v. Paulk*, XL. 109.

23. No action can be maintained by a creditor against a bank, after its effects have been placed in the hands of receivers. *Leathers v. Shipbuilders' Bank*, XL. 386.

24. Section 8, c. 164, of Act of 1855, is constitutional. *Leathers v. Shipbuilders' Bank*, XL. 386.

25. Under R. S. of 1841, c. 69, banking corporations are liable to the same penalties as individuals for taking usurious interest. *Lumberman's Bank v. Bearce*, XLI. 505.

26. The receivers of a bank, have no rights superior to those which the bank had by its directors; and the liabilities of third parties to the bank are not varied by the appointment of receivers. *Lincoln v. Fitch*, XLII. 456.

27. The president, with the knowledge of the directors, obtained a draft signed in blank, and entrusted to a third party for another purpose, without consideration, and without the knowledge of the drawers, and used it to increase the apparent assets of the bank; — *Held*, that the bank stood in no better condition than the person who had been entrusted with it. *Lincoln v. Fitch*, XLII. 456.

28. Notes or other securities, discounted in violation of the Act of 1841, c. 77, and like prohibitory provisions of statute, cannot be enforced. *Richmond Bank v. Robinson*, XLII. 589.

29. The violation of certain other provisions of the law, designed to regulate the general business of banks, does not affect the validity of contracts between the bank and its ordinary customers. It may afford ground for an injunction or work a forfeiture of the charter. *Richmond Bank v. Robinson*, XLII. 589.

30. A director in a bank indorsed a note which was discounted at his bank, he, at the time, being liable to the bank for a greater amount than was au-

thorized by the Act of 1841, c. 77, § 19:—*Held*, that, as to him, the violation of that provision was entirely collateral; it did not enter into or affect his contract. *Richmond Bank v. Robinson*, *XLII.* 589.

## BANKRUPTCY.

1. In an action against husband and wife for goods sold to her before marriage, where the wife, while sole, had been duly declared a bankrupt, under the U. S. Act of 1841, and had petitioned for her discharge, and then intermarried with the other defendant; and, subsequently to the marriage, a certificate of discharge, under a decree of the Court, was issued to her in her maiden name:—*Held*, that such certificate was a good defence to such suit. *Chadwick v. Starrett*, *XXVII.* 138.

2. To impeach a certificate in bankruptcy on account of "some fraud or willful concealment by him of his property," the "prior reasonable notice, specifying in writing such fraud or concealment," required by the bankrupt Act, should be by replication to the defendant's plea, seasonably filed, or by written notice seasonably given, setting forth specifically, the fraud and concealment, and wherein it consisted, as if it were a special declaration in an action of the case. *Chadwick v. Starrett*, *XXVII.* 138. *Humphreys v. Swett*, *XXXI.* 192.

3. Where one was declared a bankrupt under the U. S. bankrupt Act of 1841, the personal property of the bankrupt, whether inserted in his schedule of effects or not, vested in his assignee on his appointment. And upon the assignee's sale, pursuant to a decree of the Court, the property vests in the purchaser. *Jewett v. Preston*, *XXVII.* 400.

4. If, during the pendency of an action, the plaintiff became a bankrupt, under the U. S. bankrupt Act of 1841, and afterwards failed to support his action, and judgment was rendered against him for costs of suit, his bankruptcy, not having been interposed by him as an objection, furnishes him no defence in an action upon that judgment. *Wilkins v. Warren*, *XXVII.* 438.

5. A judgment having been recovered after the debtor had filed his petition and had been declared a bankrupt, under the U. S. bankrupt Act of 1841, could not have been proved in bankruptcy against him, and is not discharged by a certificate, obtained after the judgment was recovered. *Holbrook v. Foss*, *XXVII.* 441. *Ellis v. Ham*, *XXVIII.* 385. *Fisher v. Foss*, *XXX.* 459. *Pike v. McDonald*, *XXXII.* 418. *Leighton v. Atkins*, *XXXV.* 118. *Uran v. Houdlette*, *XXXVI.* 15. *Bowley v. Bowley*, *XLI.* 542.

6. The lien preserved by the second section of the U. S. bankrupt Act, of 1841, cannot exist, after the debt, judgment or other instrument, by which it was upheld, has been discharged or annulled. *Howe v. Handley*, *XXVIII.* 241.

7. But where the lien by virtue of an attachment of chattels, is discharged by proceedings in bankruptcy during the pendency of an action of replevin of the property attached, the creditor, by R. S., c. 130, § 14, is entitled to receive, from the officer, interest, at the rate of twelve per cent. per annum, on the value of the property for so long a time as the service of his execution was delayed; to be retained for his own use, and not applied to the discharge of his judgment. *Howe v. Handley*, *XXVIII.* 241.

8. Where the purchaser of the debtor's right to property attached, at a sale in bankruptcy, has released to the attaching officer all claim thereto, the officer cannot recover any thing on the replevin bond for the use of such debtor or his assignee, although it did not appear that the assignee had observed all the rules prescribed in making the sale. *Howe v. Handley*, xxviii. 241.

9. The simple omission of certain items, the property of the bankrupt, in his schedule of assets, is not alone sufficient to sustain the allegation, "that the defendant fraudulently omitted in his schedule of assets," that property. *Crooker v. Trevett*, xxviii. 271.

10. If, in regard to a replication to a plea in bankruptcy, that the defendant fraudulently omitted certain property belonging to him, in his schedule, the jury be instructed that if they believed the defendant "considered" this property, to be the property of another person named, then they should find a verdict for the defendant, is erroneous, as it might mislead the jury. *Crooker v. Trevett*, xxviii. 271.

11. Where the claim against a bankrupt, at the time of filing his petition, was a contingency, or possibility that a claim or debt might exist, it could not be proved as a claim against the bankrupt's effects, and is not discharged by his certificate. Hence, if one become surety on a constable's bond, the surety had no claim which could be proved under the bankrupt Act, until he had suffered an injury in consequence of so becoming surety. *Ellis v. Ham*, xxviii. 385. *Dole v. Warren*, xxxii. 94. *Reed v. Pierce*, xxxvi. 455. *Lewis v. Brown*, xli. 448.

12. A claim to recover damages for official neglect of duty as a constable, is in form *ex delicto*, and is not discharged by a certificate in bankruptcy, unless a judgment had been obtained upon it before the petition was filed. *Ellis v. Ham*, xxviii. 385.

13. A debt discharged under the U. S. bankrupt Act, of 1841, is a sufficient consideration for a promise, made after the decree of bankruptcy, to pay the same demand. *Corliss v. Shepherd*, xxviii. 550. *Spooner v. Russell*, xxx. 454.

14. A new promise to pay a debt, which otherwise would have been discharged by proceedings in bankruptcy, made after the decree of bankruptcy, and before the certificate of discharge, is valid and binding upon the party making it. *Corliss v. Shepherd*, xxviii. 550. *Spooner v. Russell*, xxx. 454.

15. By the latter clause of the 8th § of the U. S. bankrupt law of 1841, declaring that certain actions should not be maintained, "unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued," is intended, merely, that no suit by or against the assignee, claiming an adverse interest in any property or right of property, transferrable to, or vested in, such assignee, and no suit by or against any other person claiming an adverse interest in the same, should be maintained, unless brought within two years. Therefore, an action upon a note, given by a person to a bankrupt, before the decree of bankruptcy, is not barred by such limitation. *Carr v. Lord*, xxix. 51.

16. If an action be brought, in the name of an assignee, on a note given by the defendant to the bankrupt, without the knowledge or consent of the assignee, and before he had actual possession of such note, he may afterwards ratify the act, and proceed to judgment in the same manner as if the

suit had been originally commenced by his direction. *Carr v. Lord*, xxix. 51.

17. Though a petitioner in bankruptcy may have had an equitable interest in land, which had been sold by the legal owner, who had taken a note payable to himself for the purchase money, it would not follow that the petitioner in bankruptcy had any interest in the note; nor would an omission to specify the note in his schedule, be conclusive evidence of fraud on his part, such as to invalidate his discharge. *Carey v. Esty*, xxix. 154.

18. The bankrupt laws of another country cannot govern our courts in regard to contracts made there, excepting from a principle of comity, extending the right to other nations, which it demands and exercises for itself. *Very v. McHenry*, xxix. 206. *Long v. Hammond*, xl. 204.

19. A discharge in bankruptcy, from the contract, according to the law of the place where it is made and to be performed, is a legal bar everywhere, and extinguishes the contract. *Very v. McHenry*, xxix. 206. *Long v. Hammond*, xl. 204. *Mansfield v. Andrews*, xli. 591.

20. The D. C. of the U. S. had no jurisdiction of a petition, filed after the repeal of the bankrupt Act, although it had been made, signed and sworn to, prior to said repeal, for the purpose of being filed; and a discharge granted upon such petition, is no bar to a contract due before the signing of such petition. *Wells v. Brackett*, xxx. 61.

21. The purchaser of a bankrupt's right in a tract of land, if he never was a creditor of the bankrupt, nor if he represents any creditor, takes only the rights in law and equity, which the bankrupt had at the time of his bankruptcy. *Baker v. Vining*, xxx. 121. *Kittredge v. McLaughlin*, xxxiii. 327.

22. A plea of bankruptcy to an action on a promissory note, is bad, if it do not allege, that the debt sued for was not of the classes excepted in the first section of the bankrupt Act. *Frost v. Tibbets*, xxx. 188.

23. A discharge in bankruptcy, operates not to suspend, but to annul, the validity of a promissory note, due from a bankrupt. The indorsement of such a note, after discharge, is of no effect. And a new promise by the bankrupt to the payee, after the discharge, cannot be enforced by the indorsee. *White v. Cushing*, xxx. 267. *Porter v. Porter*, xxxi. 169. *Wardwell v. Foster*, xxxi. 558.

24. A new promise to pay a debt proveable in bankruptcy, after the filing of the petition of the defendant, and before the enactment of the statute of 1848, c. 52, was binding. That statute is prospective only. *Spooner v. Russell*, xxx. 454. *Otis v. Gazlin*, xxxi. 567. *Williams v. Robbins*, xxxii. 181.

25. A promise, by a bankrupt, to give a new note for a debt which has been discharged in bankruptcy, is not an express promise to pay the debt, but a mere recognition or acknowledgment of the debt, and creates no legal liability to pay the same. *Porter v. Porter*, xxxi. 169.

26. If a creditor, whose claim has been proved and allowed in bankruptcy, would avail himself of any fraud or willful concealment or unlawful preference of creditors on the part of the bankrupt, he can do it only by objecting to the granting of a discharge to the bankrupt, in the court of bankruptcy. And he is precluded from maintaining a suit upon any claim thus proved and allowed. *Humphreys v. Swett*, xxxi. 192.

27. A new promise made by a bankrupt revives the debt. It need not be declared upon as the cause of action, but may be proved as a bar to the operation of the discharge. *Otis v. Gazlin*, xxxi. 567.

28. The following language spoken by a bankrupt to his creditor;—"as you have used me well, you shall not lose a cent by my going into bankruptcy. I expect to get through this season, and will pay a part of it next fall, and the rest as fast as I can."—And, in a subsequent conversation, defendant told plaintiff;—"I have got through, cannot pay now, will pay as soon as I can;"—constitute conditional promises; and in order to recover, plaintiff must show defendant's ability to pay. *Patten v. Ellingwood*, xxxii. 163.

29. The purchaser of a bankrupt's interest in land, at an authorized sale by the assignee, takes the land freed from any incumbrances thereon, made by the bankrupt, in fraud of his creditors, although the license authorized the assignee to sell an equity, and although there is no evidence that the assignee gave the notice required except what is contained in the deed. *Dwinel v. Perley*, xxxii. 197.

30. The limitation in the bankrupt Act of the U. S., § 8, applies to actions in the name of the assignee, though brought wholly for the benefit of a third party. *Pike v. Lowell*, xxxii. 245.

31. Sales of a bankrupt's estate, by his assignee in bankruptcy, under the U. S. bankrupt Act of 1841, were valid, only when authorized by the court. And the transfer of a mortgage must recite the decree of bankruptcy and the appointment of the assignee. *Warren v. Homestead*, xxxiii. 256.

32. A right which may be yielded to the bankrupt by the waiver of a previous forfeiture, after the filing of a petition to be decreed a bankrupt, does not pass by an assignee's sale. And the defendant, not being a creditor, cannot assume that character to resist his title. *Kittredge v. McLaughlin*, xxxiii. 327.

33. If a bankrupt, since his application in bankruptcy, have purchased an equity of redeeming mortgaged land, the mortgagee, (though he have also bought the bankrupt's right to the land by a sale in bankruptcy,) cannot bar the bankrupt's right to redeem, by merely showing, that, at the time of such application, the bankrupt had a conditional bond for a conveyance to him of the equity, unless the mortgagee shall have performed the condition of the bond. Before the purchaser could become the owner of the land subject to the mortgage, he must, by a suit in equity, in which all opposing interest could be examined, obtain a conveyance of it. *Kittredge v. McLaughlin*, xxxiii. 327.

34. A discharge in bankruptcy is no bar to the creditor's right of action against the debtor, on a covenant of warranty, when the breach occurs after such discharge. *Reed v. Pierce*, xxxvi. 455.

35. An outstanding mortgage constitutes a breach of the covenant of freedom from incumbrances, immediately after the delivery of the deed; and if such delivery be prior to an application in bankruptcy, it is a proveable claim against him. *Reed v. Pierce*, xxxvi. 455.

36. Sect. 8, of the bankrupt Act of the U. S., passed 1841, does not apply to conveyances of real estate. *Warren v. Miller*, xxxviii. 108.

37. Payment for work done for another, under a parol promise that it should go in payment of a debt from which he had been discharged in bankruptcy, cannot be recovered, although no settlement has been made and the accounts of the parties remain unliquidated, notwithstanding the Act of 1848, c. 52. *Sampson v. Curtis*, xxxix. 398.

38. When a foreign court of bankruptcy has jurisdiction of the person applying for the benefit of the bankrupt Act of that country, and a decree is made in conformity with the requirements of the law of that country, it operates to discharge the contracts of the applicant, and cannot be impeached in a subsequent action upon such contracts prosecuted in this State by a citizen of that country. *Long v. Hammond*, **XL**. 204.

39. Bankruptcy rightfully pleaded in a suit, commenced prior to the proceedings in bankruptcy, operates to dissolve any attachment made in the suit. *Bowley v. Bowley*, **XLI**. 542.

40. When the protection of the bankrupt Act is invoked, the defendant must show that he is within its provisions. *Mansfield v. Andrews*, **XLI**. 591.

41. A. entrusted B. with his money to take to a distant place to pay A.'s note, which money B. appropriated to his own use, after which B. obtained his discharge under U. S. bankrupt Act: — *Held*, that B. did not act in the "fiduciary capacity" contemplated by that Act; and that his discharge was a bar to an action for the money. *Phillips v. Russell*, **XLII**. 360.

See ACTION, 46, 74.

FOREIGN LAWS, 1, 2.

## BARGAIN AND SALE.

See CONVEYANCE.

SALE.

## BASTARDY.

1. Where a mother has recovered judgment upon a previous adjudication, that the putative father of her illegitimate child should pay to her a sum of money, she is entitled to have the execution running against his body; notwithstanding he may have been discharged, on taking the poor debtor's oath, from an imprisonment, which had been ordered upon his refusal to give bond for the performance of the original adjudication. *McLaughlin v. Whitten*, **XXXII**. 21.

2. In a bastardy process, in order to authorize the admission of the complainant as a witness, it is not indispensable that she make her complaint before a magistrate prior to the birth of the child. *Swett v. Stubbs*, **XXXIII**. 481. *Beals v. Furbish*, **XXXIX**. 469.

3. It is indispensable to the success of a complaint under the bastardy Act, that the complainant be admitted and testify, as a witness. *Blake v. Jenkins*, **XXXIV**. 237.

4. In order to entitle the complainant to be a witness in her own cause, it must be proved, that she accused the respondent as the father of the child *of which she is about to be delivered, at the time of her travail*, and remain constant in such accusation. Such an accusation is too late, if not made until the child has been expelled from the body of the mother, though made



before the connecting cord is severed and before the child has breathed. *Blake v. Jenkins*, xxxv. 433. *Beals v. Furbish*, xxxix. 469.

5. A bastardy process pertains to the civil and not to the criminal department of the law. Hence, a term of the court, held for the transaction of criminal business, has no jurisdiction, and its proceedings thereon are merely void. *Mahoney v. Crowley*, xxxvi. 486. *Smith v. Lint*, xxxvii. 546.

6. If, pending a complaint under the bastardy Act, and before trial, the child dies, the putative father is, nevertheless, chargeable with the expenses from its birth. *Smith v. Lint*, xxxvii. 546.

7. The accusation and examination of the complainant under the bastardy Act, are not required to contain allegations of an accusation in the time of her travail, or of constancy therein, nor is it necessary to state the precise time when the child was begotten; but if charged as having transpired between the first and fifteenth of the month recited, it is sufficient. *Beals v. Furbish*, xxxix. 469.

8. The requirement of "accusing" at the time of her travail is satisfied, if her accusation is made during the interval of her pains. *Beals v. Furbish*, xxxix. 469.

9. If, in her declaration, she allege the child was begotten on or about a certain day, it is a compliance with the statute. The certainty in criminal matters is not required in these proceedings. *Beals v. Furbish*, xxxix. 469.

10. After a verdict against the respondent in a bastardy process, it is no ground for a new trial, that the jury found the child was begotten at a later time than that charged in the complaint and declaration. *Beals v. Furbish*, xxxix. 469.

## BETTERMENTS.

1. In a writ of entry, by a party to whom a portion of land had been set off in severalty, *it was held*, if the tenant should prove, that, for more than six years prior to the filing of such petition for partition, he, and those under whom he claimed, had been occupying and improving the same portion of land, his right to betterments would not be affected by the partition. *Tilton v. Palmer*, xxxi. 486.

2. The occupation by an administratrix cannot be added to that of an intestate, to make up the six years necessary to give a right to betterments. In order that two occupations be united for that purpose, the title must pass by some contract from the former to the latter. *Bullen v. Arnold*, xxxi. 583.

3. To entitle a tenant to betterments under R. S., of 1841, c. 145, § 23, his possession must be open, notorious, exclusive and adverse. *Pratt v. Churchill*, xlii. 471.

4. The Act of 1844, c. 6, § 1, providing, that the tenant for years may recover betterments against the owners of the expectant estate, does not affect any made prior to the passage of the Act. *Pratt v. Churchill*, xlii. 471.

See REVERSIONER, &c.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. FORM, CONSTRUCTION, AND VALIDITY.
- II. NEGOTIABILITY AND TRANSFER.
- III. ACCEPTANCE.
- IV. PRESENTMENT, DEMAND AND NOTICE.
- V. LIABILITIES AND REMEDIES OF THE DIFFERENT PARTIES.
- VI. ACTIONS ON BILLS AND NOTES.
- VII. PLEADINGS AND EVIDENCE.

## I. FORM, CONSTRUCTION, AND VALIDITY.

- (a) GENERAL REQUISITES.
- (b) CONSTRUCTION.
- (c) CONSIDERATION.
- (d) WHEN A DISCHARGE OF THE ORIGINAL CAUSE OF ACTION.
- (e) WHEN NOT VALID.
- (f) NOTES PAYABLE IN SPECIFIC ARTICLES.

(a) *General requisites.*

1. A promissory note must contain a promise to pay money absolutely and unconditionally; and if it provides for the performance of some other act, or in the alternative, it loses a distinctive quality of a promissory note. *Dennett v. Goodwin*, XXXII. 44. *Bunker v. Athern*, XXXV. 364.

2. And it must be for a fixed and certain, and not a variable amount. *Dodge v. Emerson*, XXXIV. 96.

3. It is essential to a bill of exchange or note, that it should be payable in money, absolutely, and without any contingency which would embarrass its circulation. Contingencies as to the amount, the event, the fund, or the person, render them invalid for commercial purposes. *Byram v. Hunter*, XXXVI. 217.

4. Drafts drawn in this State, and payable in other States, are foreign bills of exchange. *Ticonic Bank v. Stackpole*, XLI. 302.

5. A note payable in another State, may be treated as a foreign bill so far as to admit the protest of a foreign notary as evidence in a suit against the indorser. *Ticonic Bank v. Stackpole*, XLI. 302.

(b) *Construction.*

6. A paper given by defendant to plaintiff, promising to pay him "one hundred and twenty-three and 6-100, on demand and interest, with the figures \$123,06, in the margin, is a note payable in money, and for a sum certain. *Coolbroth v. Purinton*, XXIX. 469.

7. Promissory notes, made payable at a time and place certain, and not payable at a place certain, on *demand* at or after the expiration of a time specified, are not affected by the Act of 1846, c. 218. *Stowe v. Colburn*, XXX. 32. *Patterson v. Vose*, XLIII. 552.

8. The words, "property of A. B." written in pencil upon the margin of an indorsed negotiable note, are not, of themselves, proof that A. B., at the

time of the trial, in a suit upon the note, had any interest in it. *Sibley v. Lumbert*, xxx. 253.

9. When a person, not the payee, writes his name in blank upon the back of a negotiable promissory note, at its inception, it is to be regarded as done for the same consideration with the expressed contract, and he will be holden as a surety and an original promisor; but if done subsequent to the date of the note, and without a prior indorsement by the payee, it is presumed to have been done for a different consideration, and the party will be regarded as a guarantor; but if affixed after an indorsement by the payee, the party will be treated as a subsequent indorser. If made without date it is presumed to have been done at inception. *Colburn v. Averill*, xxx. 310. *Irish v. Cutter*, xxxi. 536. *Adams v. Hardy*, xxxii. 339. *Malbon v. Southard*, xxxvi. 147. *Lowell v. Gage*, xxxviii. 35.

10. By the common law, a note made payable to a married woman belongs to her husband. *Greenleaf v. Hill*, xxxi. 562.

11. The day of the date of a promissory note, payable in a specified time after date, is to be excluded. *Ammidown v. Woodman*, xxxi. 580.

12. If there be several notes of the same date, payable in six months, six months from date, and six months after date, they all have the same pay-day. *Ammidown v. Woodman*, xxxi. 580.

13. Upon a note payable in such articles as the creditor shall select from those which the debtor is manufacturing at a specified place, a legal inference arises, that the payment is to be made at that place. *Dunn v. Marston*, xxxiv. 379.

14. An instrument in writing, acknowledging the receipt of money from the plaintiff, and promising to pay it upon a note due from him to a third person, and cause it to be indorsed thereon, requires no more than that the promisor should cause the indorsement to be made; and as he might do this without the payment of money, his promise does not constitute a promissory note. *Bunker v. Athearn*, xxxv. 364.

15. Where one, not otherwise a party to a note, puts his name upon the back before it is delivered to the payee, at the request of the maker, he thereby becomes an original promisor, although he adds to his name the words, "responsible without demand or notice." *Malbon v. Southard*, xxxvi. 147. *Lowell v. Gage*, xxxviii. 35.

16. Or if done at a subsequent time, in pursuance of an agreement made with the payees at the time the contract, out of which it originated, was made, he is chargeable as an original promisor. *Leonard v. Wildes*, xxxvi. 265.

17. A memorandum and promise in writing, by the makers of a note, to pay it "in any time within six years" from the date of the writing, is, in law, a promise to pay on demand. And such new promise, although attested by a witness, is not a promissory note, but is subject to the limitation bar of six years. *Young v. Weston*, xxxix. 492.

18. The character in which the parties to a note sign the same, is presumed to be correctly exhibited by the writing itself, until the contrary be proved. *Lord v. Moody*, xli. 127.

#### (c) *Consideration.*

19. The conveyance of land, subject to a mortgage made by a former own-

er, on condition that certain personal services should be performed by the mortgager, is a sufficient consideration for the purchase money. *Hoyt v. Bradley*, xxvii. 242.

20. A partial failure of consideration of a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent misrepresentations respecting the quantity of timber trees then upon it, may be given in evidence, in defence, in a suit upon such note, while it remains in the hands of the seller, or of one having no superior rights. *Hammatt v. Emerson*, xxvii. 308.

21. And if the purchaser contracts to sell a portion of the land to another, and gives to the seller in part payment, a note, signed by such other, as principal, and by the purchaser as surety, this does not affect the relations between the seller and purchaser, nor take away the right of the latter to set up fraud in the contract, as a defence. *Hammatt v. Emerson*, xxvii. 308.

22. Between the original parties, a partial failure of consideration, though the amount of it be unliquidated, may be proved by the defendant in mitigation of damages; and the jury, upon the evidence, may determine the amount of failure. *Herbert v. Ford*, xxix. 546.

23. Ordinarily, a promissory note, given for a mere quitclaim deed of land, cannot be avoided for defect in the grantor's title; but where the parties have stipulated in writing, that the note is not to be paid, unless a title was conveyed, it is otherwise. *Bean v. Flint*, xxx. 224.

24. When a note, payable on time, is given for the amount of one over-due against the same maker, no principle of law is violated by an agreement of the parties, that the old note should be holden by the payee as collateral to the new one. And the extension of the pay-day is a sufficient consideration to uphold a new note. And an agreement to cancel the old note upon the payment of the new one, is a sufficient consideration. *Langley v. Bartlett*, xxxiii. 477.

26. A partial failure of title to land conveyed, constitutes no defence to a note given in payment for it. *Morrison v. Jewell*, xxxiv. 146.

27. A note, given to discharge all claims of a creditor under levies upon the interest of a mortgagee in mortgaged land, after the time of redemption had expired, is not void for want of consideration. *Randall v. Farnham*, xxxvi. 86.

28. A negotiable note given by defendant, for which he received one of the same amount, is made upon good consideration, and its payment cannot be avoided, though it came into the hands of the plaintiff after its maturity. *Dockray v. Dunn*, xxxvii. 442.

29. A note, given in renewal of one already paid, is without consideration. *Smith v. Taylor*, xxxix. 242.

30. The relinquishment of an attachment is a sufficient consideration. *Smith v. Taylor*, xxxix. 242.

31. A note, given for interest above the rate of six per cent. per annum, for the forbearance of payment of a sum of money, is without legal consideration. *Goodrich v. Buzzell*, xl. 500.

(d) *When a discharge of the original cause of action.*

32. There is no presumption in law, that an unnegotiable note, of the same amount as a pre-existing debt, is payment of it. *Bartlett v. Mayo*, xxxiii. 518.

33. Negotiable paper, taken for a prior debt, is presumed to be taken as payment. *Bangor v. Warren*, xxxiv. 324. *Fowler v. Ludwig*, xxxiv. 455. *Shumway v. Reed*, xxxiv. 560. *Gooding v. Morgan*, xxxvii. 419.

34. But it is not conclusive, and may be rebutted by proof of circumstances showing that it was not the creditor's intention so to receive it. *Fowler v. Ludwig*, xxxiv. 455. *Shumway v. Reed*, xxxiv. 560.

35. If negotiable paper be accepted in ignorance of the facts or under a misapprehension of the rights of the parties, the presumption might be considered as rebutted. *Fowler v. Ludwig*, xxxiv. 455.

36. If the negotiable paper accepted is not binding upon all the parties previously liable, the presumption of payment may be considered as repelled. *Fowler v. Ludwig*, xxxiv. 455.

37. Or if the paper of a third person be received not expressly in payment, the presumption may be considered as repelled. *Fowler v. Ludwig*, xxxiv. 455.

(e) *When not valid.*

38. If one, without the consent of the maker, affix his name as subscribing witness to a note which had been executed without attestation, it is a material alteration of the note, and will vitiate it; unless it be done without intention to defraud. *Thornton v. Appleton*, xxix. 298.

39. An attestation to a note, at the time of its inception, and in the presence of the maker, though unrequested to do so, gives it the legal qualities of a witnessed note. *Farnsworth v. Rowe*, xxxiii. 263.

40. A name, written at the place commonly used for attestations, is presumed to be so done as a subscribing witness; it not being necessary for the subscribing witness to a note to write thereon for what purpose he affixes his signature. *Farnsworth v. Rowe*, xxxiii. 263.

41. If one of two joint debtors, though not co-partners, give a note for a debt, signed in their joint names as co-partners, a subsequent promise by such other debtor to pay the note, made with a full knowledge of the facts, renders the note valid against both. *Waite v. Foster*, xxxiii. 424.

42. At common law, the promissory note of a married woman, as a general proposition, was absolutely void; and that rule was not changed by statute of 1844. *Howe v. Wildes*, xxxiv. 566.

43. The principal of a note, already bearing the signatures of the sureties, put his own name upon it, above the names of the sureties, in the presence of A., who then wrote his name upon it as subscribing witness, in the absence of the sureties, and without limitation, which note was delivered the next day: — *Held*, that such attestation was not a material alteration of the note, and the attestation did not affect the sureties. *Hilton v. Houghton*, xxxv. 143.

44. A promissory note given to their treasurer, for the penalties belonging to a town upon the conviction of the defendant, for a violation of § 6, c. 205, of the Acts of 1846, is for an illegal consideration and void. *Kendrick v. Crowell*, xxxviii. 42.

45. No action can be maintained against a surety upon a promissory note, made payable to a bank or order, which was never discounted or negotiated by the bank, but which was sold by the principal to a third person, although the bank authorize a suit to be prosecuted in their name. *Manufacturers' Bank v. Cole*, xxxix. 188.

46. A note, taken by an agent from his principal, for money advanced by him in payment for liquors purchased for his principal, does not come within the prohibition of the statute of 1851, c. 211, § 16. *Parker v. Tuttle*, xli. 349.

(f) *Notes payable in specific articles.*

47. Notes payable in money or other things, in the alternative, are barred by the statute of limitations, although attested. *Dennett v. Goodwin*, xxxii. 44.

48. Upon a note payable in such articles as the creditor shall select from those which the debtor is manufacturing at a specified mill, a legal inference arises that the payment is to be made at that mill. *Dunn v. Marston*, xxxiv. 379.

49. Upon a note payable in specific articles, on demand, the defendants are bound to have, at all times at the place of delivery, enough articles of the kind mentioned to enable them to comply with their stipulation; and when the demand is made at a reasonable hour and at the proper place, it will be equally available whether the defendants are present or absent. *Dunn v. Marston*, xxxiv. 379.

50. An action on a note, payable in "legal services on demand," cannot be maintained, without proof of a demand, and the services desired of the promisor made known to him; unless it is shown that he is disabled or disqualified to perform the contract. *Haskell v. Matthews*, xxxvii. 541.

51. The promisee has a reasonable time in which he may require such services to be performed, without unexpected expense or inconvenience; but the promisor is not bound to remain in the place or vicinity for any period it might please the promisee to wait before he made a demand for its performance. *Haskell v. Matthews*, xxxvii. 541.

52. A promisor's removal out of the State, after a reasonable time has elapsed, will not render him liable, unless an occasion for such services be proved. *Haskell v. Mathews*, xxxvii. 541.

## II. NEGOTIABILITY AND TRANSFER.

53. A blank indorsement is sufficient of itself to transfer the right of action to any *bona fide* holder of a negotiable note. *Myrick v. Hasey*, xxvii. 9.

54. The words, "I hereby guaranty the payment of the within note, R. D. H.," written by the payee upon the back of a negotiable note, is a sufficient indorsement thereof, though the guaranty is not negotiable. *Myrick v. Hasey*, xxvii. 9.

55. Any illegality in the transfer of a note negotiable, will vitiate the title of one who derives it through a violation of law to which he was a party; although one not a party to such violation, and holding it *bona fide*, may recover it. *Sproule v. Merrill*, xxix. 260.

56. The indorsement of a note made by a bankrupt, after his discharge, is of no effect; and a new promise to the payee after the indorsement, is not negotiable. *White v. Cushing*, xxx. 267.

57. A negotiable note, payable to a co-partnership firm, may be transferred by indorsement made by one of the co-partners, in the name of the firm, after a dissolution of the co-partnership, if such dissolution was unknown to the indorsee. *Cony v. Wheelock*, xxxiii. 366.

58. An indorsement "without recourse" of a promissory note, creates no liability upon the indorser, and operates only as a transfer of the note. *Waite v. Foster*, xxxiii. 424.

59. The property in notes secured by a mortgage would pass by delivery and without any indorsement, the mortgage having been assigned. *Coombs v. Warren*, xxxiv. 89.

60. A written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable, unless it be for a fixed sum of money, and not for a variable amount. Hence, a promise for a certain sum and for another sum is not negotiable. *Dodge v. Emerson*, xxxiv. 96.

61. A bill or note may be negotiated after it has been paid, if no person would thereby be made liable upon it, who would otherwise be discharged. *Eaton v. McKown*, xxxiv. 510.

62. Whoever indorses a bill to another and comes again into the possession of it, may be regarded as the owner, and recover it with or without striking any special indorsement. *Eaton v. McKown*, xxxiv. 510.

63. An indorsement of a note to a bank, without specifying the particular bank, (there being a blank place in which to insert the name,) is a blank indorsement, which any lawful holder of the note may so alter as to insert his own name. *Adams v. Smith*, xxxv. 324.

64. The indorsement of a note by a payee, "on account of the payee," made to a bank not specified, is not restrictive. *Adams v. Smith*, xxxv. 324.

65. A negotiable note transferred by delivery only, before it became payable, may be indorsed by the administratrix of the deceased payee, with the same effect as if done by the payee personally. *Malbon v. Southard*, xxxvi. 147.

66. An order for a specified sum, drawn upon an incorporated company, and payable to order, is not deprived of its negotiability by a statement truly contained therein, that it was drawn in compliance with a vote of the company. *Byram v. Hunter*, xxxvi. 217.

67. A negotiable promissory note is none the less assignable, because its transfer by indorsement so vests the title in the assignee as to enable him to maintain an action upon it in his own name. *Fogg v. Babcock*, xli. 347.

68. The indorsement of a note by the payee, is presumed to have been made at the date of the note, in the absence of proof. But proof that it was not then made, throws the *onus* upon the indorsee to show that the indorsement is genuine, and that it was made prior to the commencement of the action. *Parker v. Tuttle*, xli. 349.

See ACTION, 15.

BANKRUPTCY, 23.

### III. ACCEPTANCE.

69. It is not necessary to the validity of an acceptance, that the name of the acceptor should appear. Any language indicating the acceptance written by him is sufficient. *Phillips v. Frost*, xxix. 77.

70. A verbal acceptance is valid; and the holder may take a special acceptance. *Phillips v. Frost*, xxix. 77.

71. As between drawer and drawee, a promise or agreement to accept a bill which should afterwards be drawn, has never been deemed an acceptance. But, as between the drawee and a third person who has taken a bill upon the

faith of a promise to accept, it has been held an acceptance ; but in such case, when the promise is in writing, it should describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others ; and that it should be received by the person taking it upon the faith of such promised acceptance. *Mercantile Bank v. Cox*, xxxviii. 500.

#### IV. PRESENTMENT, DEMAND AND NOTICE.

- (a) WHEN NECESSARY.
- (b) BY WHOM AND WHEN TO BE MADE.
- (c) AT WHAT TIME AND PLACE.
- (d) WAIVER AND MODIFICATION OF, BY AGREEMENT OR USAGE.
- (e) PROTEST.

##### (a) *When necessary.*

72. A letter addressed by the maker to the holder of a promissory note, informing him that he should not be able to pay it at maturity, and requesting an extension, will not excuse a presentment at the maker's place of residence, at its maturity. *Pierce v. Whitney*, xxix. 188.

##### (b) *By whom and when to be made.*

73. Verbal notice to an indorser, residing in the town where the note is payable, is sufficient. *Triconic Bank v. Stackpole*, xli. 321.

74. In Massachusetts, a demand of payment, of an indorser of a promissory note, must convey information of its dishonor, and should be made before the fourth day after the last day of grace. *Littlehale v. Maberry*, xliiii. 264.

##### (c) *At what time and place.*

75. A demand at either bank, in a specified city or town, is sufficient to charge the indorser of a note, made payable at any bank in said place. No previous notice need be given to him, at what bank the holder will make the demand. *Langley v. Palmer*, xxx. 467.

##### (d) *Waiver or modification of, by agreement or usage.*

76. Where a note on demand, having thereon a blank indorsement by the payee, was received of him by the holder, with the understanding, of which the indorser was perfectly conscious, that demand on the maker and notice to the indorser were not intended to form a condition upon which alone the indorser should become liable :—*Held*, that demand and notice were thereby waived. *Fullerton v. Rundlett*, xxvii. 31.

77. The parties to a note, deposited in a bank in Boston for collection, cannot be affected by a usage in the other banks, which has no existence in the bank where it is lodged. *Pierce v. Whitney*, xxix. 188.

78. A promise to pay, with a knowledge of the facts, would bind the indorser, although there had been no legal demand or notice. *McPhetres v. Halley*, xxxii. 72. *Townsend v. Wells*, xxxii. 416. *Byram v. Hunter*, xxxvi. 217. *Patterson v. Vose*, xliiii. 552.

79. Proof that the indorser had received property of the maker for security,



will not excuse the indorsee from showing demand and notice, unless the property, so taken, was sufficient, or was all that the maker owned. *Marshall v. Mitchell*, xxxiv. 227. *Marshall v. Mitchell*, xxxv. 221.

80. If security is taken before the maturity of the note, it is not material whether it was before or after its negotiation. In either case it furnishes an indemnity. *Marshall v. Mitchell*, xxxv. 221.

81. The payee of a note, after having indorsed and negotiated it, waives demand and notice, by agreeing with the maker to pay it and take it back into his own hands. And such agreement enures to the benefit of the indorser. *Marshall v. Mitchell*, xxxv. 221. *Patterson v. Vose*, xliii. 552.

(e) *Protest.*

82. The word "certificate" in the sixth section of the Act of 1841, c. 44, § 12, is equivalent to the word "protest" in the twelfth section, when it is under the hand and seal of the notary. *Ticonic Bank v. Stackpole*, xli. 302.

83. By the common and commercial law, the certificate of a foreign notary, under his hand and notarial seal, of the presentment of a foreign bill for acceptance or payment, and of his protest, is received in all courts. Such protests prove themselves. *Ticonic Bank v. Stackpole*, xli. 321.

84. A notary's certificate of protest, certified, "I duly notified I. S., indorser of said note, of said non-payment:"—*Held*, that it must have been verbal. *Ticonic Bank v. Stackpole*, xli. 321.

85. If, from the whole protest, it appear, that notice was legally given, the insertion of the word "duly," cannot impair its effect. *Ticonic Bank v. Stackpole*, xli. 321.

86. A notarial certificate, that he "exhibited the note at the place of business of the promisors, and demanded payment thereof, was answered by the person in charge, that the promisors had left no funds there to pay said note, and that, said note remaining unpaid, he duly notified the indorsers by written notices sent them by mail, and that this was done at the request of proper authority, the time limited and grace having expired," afford reasonable inference that he stated substantially these facts in the written notices. *Lewiston Falls Bank v. Leonard*, xliii. 144.

87. Notarial protests, relied on by the plaintiff and testified to by the notary as genuine, corresponding with his notarial record and descriptive of the notes in suit, are sufficient evidence to charge the indorser; and the production by the defendant of other and like notices, can have no tendency to invalidate those relied upon, or to show the want of legal notice. *Cummings v. Herick*, xliii. 203.

## V. LIABILITIES AND REMEDIES OF THE DIFFERENT PARTIES.

88. If a note be indorsed, after it has become over-due, thus:—"indorser not holden, D. S."—the indorser is nevertheless liable therefor, if a payment had been made upon the note, or a set-off can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee in entire ignorance of them. *Ticonic Bank v. Smiley*, xxvii. 225.

89. If the indorser of a note has paid to the indorsee a part thereof, he may recover the amount so paid of the maker, in an action for money paid, although a part of the money still remains unpaid. And it is wholly im-

material whether such payment be made in money or other property, if it be received as a payment of so much. *Garnsey v. Allen*, xxvii. 366.

90. If the legal interest is in the payee of a negotiable note, he can authorize an action to be brought by an indorsee, in the name of the latter, for his benefit. *Southard v. Wilson*, xxix. 56.

91. The legal inference is, that the title to a note is in the holder of it, or in some person, under whose authority, and for whose benefit he acts. *Southard v. Wilson*, xxix. 56.

92. The drawee of an order of \$55, paid \$34,75, and indorsed upon it that the payee had received that sum, "it being all that the drawee agrees to pay, unless the drawer intended the order to be exclusive of \$20,25, which the drawee had previously paid without order." It was afterwards ascertained that the drawer intended the whole \$55 should be paid by the drawee, of which the drawee was notified by a new request from the drawer: — *Held*, the drawee was liable for the balance. *Phillips v. Frost*, xxix. 77.

93. The maker of a note, sued by one having a legal interest in it, has no right to inquire into the disposition of the proceeds of it; but if the plaintiff can lawfully receive payment, the defendant is protected in making it, whatever may become of the proceeds. *Stevens v. Hill*, xxix. 133.

94. One who sells a promissory note by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise, to refund the money received therefor, if he sold the same as property, and not in payment of a debt, and if he did not know of the forgery. But if it was sold in payment of a debt due, or then created, the debt, not being paid by it, may be recovered. *Baxter v. Duren*, xxix. 434.

95. In an action by the purchaser against the seller of such a note, so sold, the broker, through whom the sale was negotiated, is a competent witness for the plaintiff if he was ignorant of the forgery, and if he did not make himself liable by any promise or representation concerning the note. For, in such case he would not be liable to the plaintiff, and would have no interest that the plaintiff should recover. *Baxter v. Duren*, xxix. 434.

96. Any one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent of some person unknown. *Baxter v. Duren*, xxix. 434.

97. When a mortgagee acknowledges payment by the mortgagers, upon the margin of the record, and discharges the mortgage given to secure a note against joint promisors, the acts and declarations of one of the promisors may control and overcome the evidence of payment, so that an action may be maintained upon the note against the other promisor. *Patch v. King*, xxix. 448. Per TENNEY, J., SHEPLEY, C. J., dissenting.

98. A new promise made by one of two joint promisors, before the R. S. of 1841, would take the case out of the statute of limitations. *Patch v. King*, xxix. 448.

99. The holder of a note is not restricted in his rights by any arrangements of the makers among themselves, made after the note has passed from their hands, when he was not a party thereto. *Patch v. King*, xxix. 448.

100. If it can be shown that a note of two joint promisors is paid, one of the makers cannot revive it, so as to create any liability in the other. *Patch v. King*, xxix. 448.

101. A payment made upon a witnessed note, gives it new life for the next twenty years. *Estes v. Blake*, xxx. 164.

102. In a suit by an indorsee against the maker of a note, barred by bankruptcy, the plaintiff cannot avail himself of a parol promise, made by the maker to the payee, to pay the note. *Wardwell v. Foster*, xxxi. 558.

103. A promise to pay, with a knowledge of all the facts, would bind the indorser, although there had been no legal demand or notice. *McPhetres v. Halley*, xxxii. 72. *Byram v. Hunter*, xxxvi. 217. *Patterson v. Vose*, xliii. 552.

104. In computing the four years, in which suits may be brought against the executor, the period during which his official action is suspended by an appeal from the decree appointing him to that office, is not to be reckoned. *McPhetres v. Halley*, xxxii. 72.

105. An action upon a negotiated note cannot be brought in the name of a person having no interest in it, except by his consent. *Franklin Bank v. Lawrence*, xxxii. 586. *Skowhegan Bank v. Baker*, xxxvi. 154. *Golder v. Foss*, xliii. 364.

106. A negotiable note in the hands of an indorsee, "to whom it came before the pay-day, for a valuable consideration, without notice that the maker had any objection to the payment of it," is good against the maker, although it was obtained from the payee and put into circulation by fraud. *Fletcher v. Gushee*, xxxii. 587.

107. A person, who indorses a bill to another and comes again into the possession of it, may be regarded as the owner of it, unless there be opposing proof, and as such may recover with or without striking out any special indorsement. *Eaton v. McKown*, xxxiv. 510.

108. If the owner of paper negotiated in blank, deposit it for collection, and the depositary transfer it as his own property, the owner, after having paid the amount to the transferee, may maintain suit upon it against the parties previously personally liable, such payment not being a discharge to them. *Eaton v. McKown*, xxxiv. 510.

109. In a suit, by the indorsee against the drawer, it will avail nothing to the defendant, that the paper does not, on its face, admit that it was drawn for value. *Byram v. Hunter*, xxxvi. 217.

110. Where a note is given for personal property to which the vendor had no title, assumpsit, to recover back the agreed price, is not maintainable in the absence of proof, either that the note was negotiable, or that it had been paid. *Huntingdon v. Hall*, xxxvi. 501.

111. If the payee of a negotiable note indorse it "not holden," when overdue, but, at the time of the transfer for full value, represents that all the signers thereto are holden to pay it, when in fact, by some act of his, one or more of them had been discharged; he may still be liable upon the note, but not as indorser. *Hankerson v. Emery*, xxxvii. 16.

112. Although two persons are partners, doing business under the name of one of them only, a bill of exchange, drawn on him and accepted, is presumed by law to belong to the individual to pay, and not to the partners. *Mercantile Bank v. Cox*, xxxviii. 500.

113. G. W. C. & Co. were building a barque, which was mortgaged to F. C. and W. B. V., and drew their bill of exchange on F. C., which was discounted by plaintiffs, and most of the money was paid out for work done on the barque. F. C. refused to accept. On the return of the bill to plaintiffs, W. B. V. promised that F. C. should accept and pay it:—*Held*, that plaintiffs could maintain no action on the bill against F. C. and W. B. V., jointly, nor severally against either. *Mercantile Bank v. Cox*, xxxviii. 500.

114. Nor, under the money counts, could a recovery be had against either, as the loan was made to others. *Mercantile Bank v. Cox*, xxxviii. 500.

115. Upon a promissory note, made payable to a bank named, or order, which was never discounted or negotiated by the bank, but which was sold by the principal to a third person, no action can be maintained by the holder against the surety thereon, although the bank authorized a suit to be prosecuted in their name. *Manufacturers' Bank v. Cole*, xxxix. 188.

See ACTION, 69, 70.

EQUITY, 142, 143.

## VI. ACTIONS ON BILLS AND NOTES.

- (a) WHEN, AND BY WHOM, AN ACTION IS MAINTAINABLE.
- (b) WHEN SUBJECT TO EQUITIES BETWEEN OTHER PARTIES.
- (c) DEFENCES.

(a) *When, and by whom, an action is maintainable.*

116. One who purchases an unindorsed negotiable note, and afterwards writes his name, with the word "holden," upon the back of it, and sells it for value, may be held as guarantor. But such contract of guaranty is not negotiable, and does not pass to subsequent holders. *Irish v. Cutter*, xxxi. 536.

117. Where A. has obligated himself to pay money to another, so soon as paid to him by a third person, the taking by him of a new note of such third person, upon an extended pay-day, is to be regarded as a payment received by A. *Greenleaf v. Hill*, xxxi. 562.

118. In a note, payable in a specified time after date, the day of the date is to be excluded. A demand was made upon such a note, in a town where there is no bank, at three o'clock in the afternoon of the last day of grace, to which the maker replied, that he never would pay it, and thereupon a suit was immediately commenced:—*Held*, the suit was not premature. *Ammi-down v. Woodman*, xxxi. 580.

119. A note for a sum certain, and for another sum, the amount of which is contingent, though made payable to order, is not negotiable, and no action can be maintained upon it in the name of an indorser. *Dodge v. Emerson*, xxxiv. 96.

120. The indorsee of a negotiable note, purchasing it for value before its pay-day, may recover in an action against the maker, though, when taking the note, he knew, that, between the maker and payee, there was a written stipulation, that on a specified contingency, the note was not to be paid, and although, before the pay-day, such contingency actually occurred. *Adams v. Smith*, xxxv. 324.

121. It is not necessary, in order to maintain an action, that a party should have an interest in the demand, if the suit is commenced in his name, with his consent, and by the authority of those interested. *Whitcomb v. Smart*, xxxviii. 264. *Golder v. Foss*, xliii. 364. *Granite Bank v. Ellis*, xliii. 367.

122. A loan, made to some individual members of an Odd Fellows' Lodge, for which a note was given to E. W., "P. S. of ——— Lodge," may be recovered by a suit upon the note, in the name of the payee, when he is authorized to commence it by the members of the Lodge, notwithstanding he may

not then hold that office, and notwithstanding he may be a co-member with defendants. *Whitcomb v. Smart*, xxxviii. 264.

123. An indorsee of a note, made by a firm to one of its members, may maintain an action thereon against the makers. *Davis v. Briggs*, xxxix. 304.

124. Where a partnership has been dissolved, and one of the partners has assigned all his interest in the book debts and demands of the firm to the other, with power to collect them for his own benefit, he cannot afterwards exercise any control over such debts, although one of them is against himself. *Davis v. Briggs*, xxxix. 304.

125. An indorsee of a witnessed note, made before the passage of the Act of 1838, c. 343, may maintain an action after that Act was passed, although more than six years elapsed between the date of the note and the commencement of the suit. *Reed v. Wilson*, xxxix. 585.

126. An action, against the maker of a note payable at a bank, commenced on the last day of grace, without evidence of a prior demand at a reasonable hour on that day, or that the suit was commenced after banking hours, is premature. *Veazie Bank v. Winn*, xl. 62.

127. An indorsee may maintain an action against the indorser (payee) of a promissory note, without notice of its dishonor, where the note was made for the accommodation of the payee, and he agreed to take care of it, although, at the time it was made and when it fell due, the maker was indebted to the payee. *Torrey v. Foss*, xl. 74.

128. Upon a lost note the owner may maintain an action at law, without furnishing indemnity to the defendant, if it appear at the time of trial that the limitation bar may be interposed to prevent a recovery by any *bona fide* holder. *Torrey v. Foss*, xl. 74. *Moore v. Fall*, xlii. 450.

129. An indorsee of a note, given for interest above the rate of six per cent. per annum, for the forbearance of the payment of a sum of money, cannot claim the character of an innocent purchaser, whose agent was cognizant of all the circumstances under which the note originated. *Goodrich v. Buzzell*, xl. 500.

130. Subsequent to the Act of 1824, c. 272, and prior to April 1, 1841, the maker of a promissory note, not discounted at any bank nor left for collection therein, was not entitled to grace. *Bowley v. Bowley*, xli. 542.

131. A recovery may be had on a lost note, which is not negotiable; or which had not been negotiated; or which had been specially indorsed to the plaintiff, to whom it is exclusively payable. *Moore v. Fall*, xlii. 450.

132. If a note be destroyed, the plaintiff, upon proof thereof, may recover in a suit at law. *Moore v. Fall*, xlii. 450.

133. An action upon a note, indorsed in blank, may be maintained in the name of any person who subsequently ratifies the act, although he has no interest in the note or knowledge of the commencement of the action, or of the existence of the note, where there is no fraud, oppression, or corrupt or improper motive; or, although he had stated to the defendant, in writing, that he had no interest in the suit and had never authorized it. *Golder v. Foss*, xliii. 364.

134. If the principal maker of a note transfer it to one not the payee, for a good consideration, such *bona fide* holder may maintain an action against such maker, in the name of the payee, with his consent. *Granite Bank v. Ellis*, xliii. 367.

135. A., B. and C., tenants in common of timber lands, in consideration of a permit to D. and E., to cut timber thereon, received severally the notes of said D. and E., each in proportion to his interest in the lands. D. and E. brought an action against A., B. and C., jointly, alleging a partial failure of the consideration of the notes, and claiming to recover back a portion of the amount:—*Held*, that such joint action could not be maintained. *Taylor v. Pierce*, XLIII. 530.

See ACTION, 60.

(b) *When subject to equities between other parties.*

136. Where one brings a suit in the name of another person, the same defence may be made, as if he were a party to the record. *Sproule v. Merrill*, XXIX. 260. *Herbert v. Ford*, XXIX. 546.

137. In action upon a note between the original parties, a partial failure of consideration, though the amount of it be unliquidated, may be proved in mitigation; and the jury, upon the evidence, may determine the amount of the failure. *Herbert v. Ford*, XXIX. 546. *Hammatt v. Emerson*, XXVII. 308. *Coburn v. Ware*, XXX. 202. *Bramhall v. Beckett*, XXXI. 205.

138. It is not necessary to restore what he had received under the contract, to enable the party to set up such defence. *Herbert v. Ford*, XXIX. 546.

139. If an accommodation note be negotiated *bona fide*, for a valuable consideration, to one who is not apprized of any facts or circumstances which would discredit it, the accommodation party cannot open the consideration. *Bramhall v. Becket*, XXXI. 205. *Malbon v. Southard*, XXXVI. 147.

140. But where the indorsee receives a bill or note as collateral security merely, for a pre-existing debt, without parting with any right, extending any forbearance, or giving any other consideration, he cannot be regarded as the holder for a valuable consideration. *Bramhall v. Beckett*, XXXI. 205.

141. A negotiable note in the hands of an indorsee, "to whom it came before the pay-day, for a valuable consideration, without notice that the maker had any objections to paying it," is good against the maker, although it was obtained from the payee and put into circulation by fraud. *Fletcher v. Gushee*, XXXII. 587. *Walker v. Davis*, XXXIII. 516. *Drake v. Rogers*, XXXII. 524.

142. An indorsee who purchases a note with knowledge of its infirmities, takes it subject to the equities. *Morrison v. Jewell*, XXXIV. 146.

143. A note indorsed and transferred, before its pay-day, by the payee to his creditor, in discharge of a debt, is to be considered a note transferred in the ordinary course of business, and, in a suit by the indorsee against the maker, will be protected against any equitable defences, which might have prevailed in a suit by the payee against the maker. *Adams v. Smith*, XXXV. 324.

144. The indorsee of a negotiable note, purchasing it for value before its pay-day, may recover in an action against the maker, though, when taking the note, he knew, that between the maker and the payee, there was a written stipulation, that on a specified contingency, the note was not to be paid, and although before the pay-day, such contingency actually occurred. *Adams v. Smith*, XXXV. 324.

145. An indorsee of a note, given for interest above the rate of six per cent. per annum, cannot claim the character of an innocent purchaser, whose

agent was cognizant of all the circumstances under which the note originated. *Goodrich v. Buzzell*, XL. 500.

(c) *Defences.*

146. A partial failure of consideration for a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent representations respecting the quantity of timber trees then upon it, may be given in evidence in defence in a suit upon such note, while it remains in the hands of the seller, or in the hands of one having no superior rights. *Hammatt v. Emerson*, XXVII. 308.

147. And if the purchaser makes a contract to sell a portion of the land to another, and gives to the seller in part payment, a note, signed by such other, as principal, and the purchaser, as surety, this does not affect the relations between the seller and purchaser, nor take away the right of the latter to set up fraud in the contract, as a defence. *Hammatt v. Emerson*, XXVII. 308.

148. A partial failure of consideration of a note in an action between the original parties, though the amount be unliquidated, may be proved in mitigation. *Herbert v. Ford*, XXIX. 546.

148. It is no defence to an action on a joint note, that one of the promisors has been defaulted as trustee of the payee, and has paid the judgment thus recovered, there being no evidence to show that he was adjudged trustee on account of the note. *Hutchinson v. Eddy*, XXIX. 91.

149. A discharge in bankruptcy annuls the validity of a note due from the bankrupt. *White v. Cushing*, XXX. 267.

150. To discharge a note for merchantable boards and clapboards, the articles set out and tendered must be proved to be of such quality and condition, as, under the statute, might lawfully be "offered" or "exposed for sale," or "delivered on sale." *Jones v. Knowles*, XXX. 402.

151. In a suit upon a promissory note, if the defence be that the consideration was illegal, the burden of proof is on the defendant. *Emery v. Estes*, XXXI. 155.

152. The statute of limitations is a good defence to notes made payable in any thing else than money, although witnessed. *Dennett v. Goodwin*, XXXII. 44.

153. A receipt in full of all demands, given by the plaintiff to the defendant, if unexplained or uncontradicted, will defeat the action upon a promissory note. *Cunningham v. Bachelder*, XXXII. 316.

154. No action upon a promissory note can be maintained by an indorsee who took it, knowing it to have been obtained by fraud. *Bryant v. Couillard*, XXXII. 520.

155. In an action against the maker of a note, payable at a specified length of time after its date, brought by a *bona fide* indorsee, who obtained it before its apparent pay-day, and without knowledge of mistake in its date, the maker, in order to establish a defence that the action was prematurely brought, cannot prove, that, by mistake, the note bore a date earlier than the day upon which it was actually made. *Huston v. Young*, XXXIII. 85.

156. Upon a verbal agreement between A., B. and C., that a note due from B. to A. shall be paid by C., at a future day, the promise of C. to pay accordingly, is but executory, and does not of itself operate a payment of the note. And if the promise of C. be that he will make the payment in services, (the

promise being an entirety,) it cannot be claimed, as against the holder, that any part of the note is paid by the performance of only a part of the services. *Weeks v. Elliot*, xxxiii. 488.

157. The recovery and payment of a judgment upon an account for which an unnegotiable note was given, will bar an action upon the note. *Bartlett v. Mayo*, xxxiii. 518.

158. A partial failure alone of title to land conveyed, constitutes in this State no defence to a note given in payment for it. *Morrison v. Jewell*, xxxiv. 146. *Thompson v. Mansfield*, xliii. 490.

159. But, after the death of the payee and insolvency of his estate, the maker of the note, in a suit against him by the administrator, is entitled, under the insolvency laws, to set off the breach of covenant against the note, although his claim may not have been filed before the commissioners of insolvency. *Morrison v. Jewell*, xxxiv. 146.

160. In a suit by the indorsee against the drawer, it will avail nothing to the defendant, that the paper does not, on its face, admit that it was drawn for value. *Byram v. Hunter*, xxxvi. 217.

161. In actions on promissory notes, orders and bills of exchange, counsel of the defendant will not be permitted to deny, at the trial, the genuineness of the defendant's signature, except under the 33d rule of the Court. *Libby v. Cowan*, xxxvi. 264.

162. No action can be maintained upon a note given under duress by imprisonment; but such duress must be an unlawful restraint of the person. *Soule v. Bonney*, xxxvii. 128.

163. It is no defence to a note, that it was given for the suppression of a prosecution, criminal merely in form, but involving no criminal offence. *Soule v. Bonney*, xxxvii. 128.

164. In a suit upon a joint and several promissory note, commenced against the principal alone, and amended by making the surety a party after six years from the time the cause of action accrued; such surety may interpose the limitation bar to prevent a recovery against him. *Woodward v. Ware*, xxxvii. 563.

165. The alteration of a note by the maker after it is indorsed, by adding "with interest," is material; and if made without the consent of the indorser, he is not liable as such, although the alteration be made before delivery. *Waterman v. Vose*, xliii. 504.

See ACTION, 54.

## VII. PLEADINGS AND EVIDENCE.

166. It is not necessary to aver and prove the presentment of a promissory note, at the time and place named therein, to enable the plaintiff to maintain his action. *Lyon v. Williamson*, xxvii. 149. *Dockray v. Dunn*, xxxvii. 442. *Patterson v. Vose*, xliii. 552.

167. If the maker was there prepared to pay it, that is matter in defence, to be pleaded and established by him. *Lyon v. Williamson*, xxvii. 149.

168. Although the maker was at the place of payment, at the time named, prepared to make payment of the note, and the holder was not there to receive the money, yet if he subsequently demand payment there, and cannot obtain it, he may maintain an action against the maker to recover the amount. *Lyon v. Williamson*, xxvii. 149.



169. The plea in such case, to be good, must state, that the maker was ready to pay the money at the time and place named, that he has ever since been ready there to pay the same, and that he brings the money into Court for the plaintiff. *Lyon v. Williamson*, xxvii. 149.

170. Counsel will not be permitted to argue to the jury, that the note before them was payable, according to the agreement of the maker, at a different place than is indicated by the note itself. *Pierce v. Whitney*, xxix. 188.

171. The remedy of the holder of a note upon which there is an indorsement which takes it out of the statute of limitations, is upon the note itself, and not upon any implied promise, supposed to arise from partial payment. *Estes v. Blake*, xxx. 164.

172. If the defence to a note be that it was given in part for spirituous liquors sold, the burden of proof is upon the defendant. *Emery v. Estes*, xxxi. 155.

173. The party who would establish title in her to a note given payable to a married woman, since the statute of 1844, takes the burden of proving that it did not, in any way come from the husband. *Clark v. Viles*, xxxii. 32.

174. In an action by the indorsee of a negotiable note, if the plaintiff allege the indorsement, he need not allege a promise to himself. By operation of law, the original promise was to him. *Ware v. Webb*, xxxii. 41.

175. The statute of limitations does not, of its own force, cut off claims, unless it be presented to the Court, as a defence. Hence, it is not necessary to allege in the declaration, that the cause of action accrued within six years, or that the note was witnessed. *Ware v. Webb*, xxxii. 41.

176. A co-defendant may be cited anew, and proceeded against, although the suit had been previously discontinued as to him, on an agreement for a valuable consideration. Neither is it competent for another defendant to object to such a proceeding. *Drake v. Rogers*, xxxii. 524.

177. Such a discontinuance does not, of itself, discharge the other defendants. *Drake v. Rogers*, xxxii. 524.

178. The indorsee, in a suit against the maker, may prove, that there was a mistake in the date of a note, although by such proof, the pay-day of the note would be extended, whereby to cut off a defence, which would be good in a suit brought by the payee. *Drake v. Rogers*, xxxii. 524.

179. In a suit by an indorsee of a note, if there be no evidence of the time or circumstances of the indorsement, or of knowledge by the indorsee of any infirmity in the note, the presumption of law is, that the indorsement was made prior to the pay-day, and in the regular course of business, and without knowledge on the part of the indorsee, that the note was subject to any pre-existing equities. *Walker v. Davis*, xxxiii. 516.

180. In an action by the payee against the drawer of a draft, it is not admissible to prove, that when taking the draft, the plaintiff admitted the debt, for which it was given, to have been contracted by the drawer as agent of the drawee, and thereupon promised, that the drawer should never be held accountable. Neither could the drawer, after judgment against him in such suit, succeed in a special action upon such promise against the payee. *Fairfield v. Hancock*, xxxiv. 93.

181. The presumption, that the giving of a negotiable note, for a simple contract, was intended for payment, may be overcome by testimony. *Shumway v. Reed*, xxxiv. 560.

182. The authority of one who indorses a note, as the secretary of a cor-

poration, need not be proved by any record or usage. It is sufficiently shown by the uncontradicted testimony from a witness, that such person was the secretary and had authority. *Adams v. Smith*, xxxv. 324.

183. In a suit upon a promissory note, the plea of the general issue, will not require the plaintiff to prove the signature, unless it is denied according to the 33d Rule of Court. *Libby v. Cowan*, xxxvi. 264.

184. One, who puts his name upon the back of a note, when it is made, or at a subsequent time, in pursuance of an agreement made with the payees at the time the contract, out of which it originated, was made, is chargeable as an original promisor; and such note is legal evidence to support a count for money had and received. *Leonard v. Wildes*, xxxvi. 265.

185. When the only member of a firm entitled to complain, that the note had been improperly negotiated, or that it had been negotiated for a purpose not within the scope of the partnership, had been examined as a witness in the case, without making any objection to its negotiation, the jury would be authorized to infer, that it had been done with his consent, or that he had subsequently approved of it. *Leonard v. Wildes*, xxxvi. 265.

186. G. W. C. & Co. were building a barque, which was mortgaged to F. C. and W. B. V., and drew their bill of exchange on F. C., which was discounted by plaintiffs, and most of the money was paid out for work done on the barque. F. C. refused to accept. On the return of the bill to plaintiffs, W. B. V. promised, that F. C. should accept and pay it:—*Held*, that plaintiffs could maintain no action on the bill, against F. C. and W. B. V., jointly, or severally, against either. Nor under the money counts, as the loan was made to others. *Mercantile Bank v. Cox*, xxxviii. 500.

187. In an action, by the indorsee of a promissory note, where it is proved that the note was fraudulently put into circulation, the burden of proof is upon the plaintiff to show that he came by it fairly, in the due course of business, unattended with circumstances justly calculated to awaken suspicion. *Perrin v. Noyes*, xxxix. 384.

188. In an action by the drawee against the acceptor of a bill of exchange, evidence, that the conditions upon which it was agreed to be accepted were not fulfilled, is admissible to show a want of consideration. *Wise v. Neal*, xxxix. 422.

189. Parol evidence is admissible to show a waiver of demand and notice at the time of the indorsement of the note; and such waiver may be inferred from the circumstances and facts of the transaction. *Patterson v. Vose*, xliii. 552.

## BILL OF SALE.

1. A bill of sale made in good faith, for a valuable consideration, of a certain quantity of pickets, a portion of which were manufactured and delivered, and the remainder to be manufactured, and a place fixed for their delivery, and a delivery made accordingly, vests the title of such pickets, so set apart, in the vendee, as against the creditors of the vendor. *Veazie v. Holmes*, xl. 69.

2. A. executed to B. a bill of sale with covenants of warranty, of threc-

eighths of a vessel, and C. and D. executed to him a like bill of sale of four-eighths of the same vessel:—*Held*, that B. would have a remedy upon the covenants in his bills of sale, for money paid to discharge an incumbrance upon the vessel, at the time of the sale. *Stoddard v. Gage*, xli. 287.

3. But no action can be maintained as upon a joint promise against the three, although one of them, without the authority of the others, promised him, that if he would pay off the incumbrance, “they would settle with him.” *Stoddard v. Gage*, xli. 287.

4. A. conveyed a vessel to B. by bill of sale, upon an agreement, that B. should appropriate the proceeds of the vessel to the discharge of A.’s debts for which B. was surety:—*Held*, that this agreement was a sufficient consideration for the conveyance. *Stedman v. Vickery*, xlii. 132.

See CONTRACT, 96, 97.

## BOND.

### I. IN GENERAL.

### II. CONSTRUCTION AND BREACH.

### III. PLEADINGS AND EVIDENCE.

*Of Probate Bonds, Replevin Bonds, Poor Debtor’s Bonds, Bastardy Bonds,*

See THEIR APPROPRIATE TITLES.

### I. IN GENERAL.

1. A bond, given for the re-conveyance of land, though unrecorded, will be operative against an attaching creditor of the grantor, who attached prior to the R. S. of 1841, and who, at the time of the attachment, had notice, either expressed or implied, of such a bond. *McLaughlin v. Shepherd*, xxxii. 143.

2. A bond, given to two persons, is not rendered inoperative by the previous death of one of them; but it is available to the survivor. *Pettingill v. Patterson*, xxxii. 569.

3. A bond given to husband and wife for their maintenance during each of their lives, belongs to the wife, if she survive the husband, unless reduced to possession by him. *Pike v. Collins*, xxxiii. 38.

4. To reduce it to possession, the husband must do some act, indicating an appropriation to himself or disaffirming her right. But the recovery of a judgment by him in the name of both, upon such a bond, without taking out execution, shows a disposition not to appropriate it. *Pike v. Collins*, xxxiii. 38.

5. The interest which an obligee or his assignee has in a conditional bond for the conveyance of real estate, is attachable by his creditors. *Huston v. Jordan*, xxxv. 520.

6. A bond, given under the requirements of § 6, c. 211, of the Acts of 1851, is contrary to the provisions of the constitution, and void. *Saco v. Wentworth*, xxxvii. 165. *Saco v. Woodsum*, xxxix. 258.

7. Where a bond owned by the intestate, had been assigned by him as

security to his creditor, but was inventoried among the assets of his estate, and the obligor presented and was allowed a much larger sum against the estate, before the commissioners of insolvency, the bond is not affected by such proceedings; the commissioners having had no authority over the bond. *Ellis v. Smith*, xxxviii. 114.

8. Where such bond was assigned to several creditors of the intestate, but only one of the assignees knew of its transfer, or accepted of its provisions; as to all who had not previously assented to it, the assignment was revoked by the death of the assignor. *Ellis v. Smith*, xxxviii. 114.

9. After an assignment of a bond has been made, it cannot be revoked by the assignor without the consent of the assignee. *Reed v. Nevins*, xxxviii. 193.

10. Before acting as pound-keeper, the person chosen, must give a bond with sufficient sureties, approved by the aldermen, or selectmen, for the faithful performance of his duties. And in a suit against him, without showing that his bond was approved, before the acts complained of were done, he cannot justify as pound-keeper. *Rounds v. Mansfield*, xxxviii. 586.

11. A bond, given under the provisions of the 13th § of c. 48 of the Acts of 1853, is void; and any sale of spirituous or intoxicating liquors by the principal obligor, during the pendency of the appeal, in connection with which such bond was given, creates no liability on the part of the obligors. But where an action is commenced upon such bond, and the selectmen of the town interested indorsed upon it their approval of the suit, no costs are recoverable by the defendants. *Saco v. Woodsum*, xxxix. 258.

12. Where a bond or other contract has been settled and surrendered as satisfied by reason of mistake or fraud, it may be treated as a valid and subsisting instrument. *Chapman v. Lothrop*, xxxix. 431.

13. But when, through negligence, inattention or ignorance, the plaintiff allows his bond to be discharged by his attorney, without claiming a full performance of its conditions, and after full knowledge of the mode in which the settlement of it was made, he acquiesces in it for a long time, he cannot afterwards treat the bond as subsisting and recover a further sum, although such claim was contemplated in its original provisions. *Chapman v. Lothrop*, xxxix. 431.

14. A bond binding the obligor not to exercise a trade, is void. But where the inhibition is for a limited time, and within certain limits, it may be obligatory. And the exceptions to the ancient rule of the common law should receive a liberal construction in this country. *Whitney v. Slayton*, xl. 224.

15. Thus, where the defendant sold plaintiff an iron foundry, in Calais, and agreed not to engage in the business of iron-casting within sixty miles of that place for ten years, it not being a part of the State densely inhabited, and containing but few places of much business:—Held, that the agreement was binding. *Whitney v. Slayton*, xl. 224.

16. A bond for the conveyance of real estate, on the conditions being performed within ten days, which provides that it shall be void in case of the accidental non-reception of the deed of the premises from certain persons in whom the title is supposed to be, is binding, although at the time of its execution, the title to the land is not held by the persons supposed. *Haynes v. Fuller*, xl. 162.

17. And such a bond is valid, although the agent of the obligors, holding the title, is unable to make the conveyance to the defendants, within the time allowed, through pressure of business. *Haynes v. Fuller*, xl. 162.

18. The performance of a contract under seal, cannot be waived by a parol executory agreement. *Haynes v. Fuller*, *XL*. 162.

## II. CONSTRUCTION AND BREACH.

19. In a bond conditioned to convey land upon the payment of a note, time is not considered, in equity, to be of the essence of the contract, unless the parties have expressly agreed that it shall be so regarded, or unless it follows from the nature and purposes of the contract. *Jones v. Robbins*, *XXIX*. 351.

20. Generally, in such contracts, the time of payment is regarded, in equity, as formal and as meaning only that the purchase shall be completed within a reasonable time, and substantially according to the contract, regard being had to all the circumstances. And time is not of the essence of the contract, containing the clause, that "in case the obligee shall neglect or refuse to pay the note according to its tenor, the bond shall be void." *Jones v. Robbins*, *XXIX*. 351.

21. The obligor in a bond for the conveyance of real estate, after demand for a deed, is entitled to a reasonable time to prepare it. And when the note, on the payment of which the conveyance is to be made, is paid to an indorsee, the obligor is entitled to reasonable notice that the condition is fulfilled before he makes the deed; but it is not necessary that the note should be exhibited to him. *Russell v. Copeland*, *XXX*. 332.

22. Where a bond, among other things, stipulates that the obligee shall pay all taxes upon the land:—*Held*, that the payment of the taxes was not a condition precedent to the conveyance. *Russell v. Copeland*, *XXX*. 332.

23. A conveyance of land, and a bond, made at the same time, by the grantee, to re-convey upon the performance of certain conditions, constitute a mortgage. And an offer to perform the conditions defeats the conveyance. *McLaughlin v. Shepherd*, *XXXII*. 143.

24. Upon a bond conditioned to pay an outstanding mortgage upon land purchased by the obligee, the right of action accrues at the expiration of a reasonable time after the mortgagee would have been compellable to receive payment of the mortgage. *Gennings v. Norton*, *XXXV*. 308.

25. Upon a bond, conditioned to save harmless from such a mortgage, no right of action accrues, until the obligee had been subjected to some injury. And a liability to injury, if attended with inconvenience to the obligee, constitutes a breach, and gives an immediate right of action. *Gennings v. Norton*, *XXXV*. 308.

26. A bond, given to obtain release from an arrest made by the collector of taxes, must run to the assessors of the town and not to the inhabitants; though a bond running to the inhabitants is good at common law. *Athens v. Ware*, *XXXIX*. 345.

27. A bond, conditioned, that if within one year upon request and payment of a certain sum, the obligor shall make and execute a valid deed of a piece of land, is forfeited, by a refusal to convey on such request and payment at any time within the year. *Brown v. Clough*, *XXXIX*. 566.

28. Where, from the conditions of a bond, the obligee was to receive the sums then due, or what might be due from the settlers on their contracts; and also that one of the settlers owed about \$130, when in fact he owed only \$30:—*Held*, in an action to recover the difference, that the bond showed no

undertaking on the part of the defendant that such sum should be collected, but that the parties left the sum due from settlers as uncertain, and that no action would lie against defendant for money received by him before the contract. *Larrabee v. Woodman*, XL. 120.

29. A bond containing the stipulation, that the obligor would not engage in the business of iron-casting within sixty miles of a place named, for ten years, is broken, if the obligor become a stockholder in an incorporated company, carrying on that business within those limits, or an employee of such corporation. *Whitney v. Slayton*, XL. 224.

30. When the performance of the condition of a bond is limited to ten days, by the instrument, and an agreement made on good consideration to waive the performance as to time, is proved, but no time fixed for the performance, in determining what is a reasonable time, regard must be had to the original contract, and forty days would be too late. *Haynes v. Fuller*, XL. 162.

31. A. conveyed to B. certain real estate subject to a mortgage given by himself to a third person. B. gave back a bond conditioned to re-convey to A., by quit claim deed, a certain portion of the premises, whenever the latter should clear the remainder from incumbrance. B., afterwards, obtained an assignment of the mortgage to himself:—*Held*, that the bond created no obligation on the part of B. to discharge the mortgage, and that it did not preclude him from subsequently acquiring any additional title. *Fisher v. Shaw*, XLII. 32.

### III. PLEADINGS AND EVIDENCE.

32. Where a bond for the conveyance of land was given upon the payment of a note described in such bond, a delay to pay the note was excused, in equity, by proof that the obligee was intending to pay it, but that before, and at, and a few weeks after the pay-day, he was prevented by sickness from attending to any business affairs, and that, upon his recovery, he sought permission of the obligor to pay it. *Jones v. Robbins*, XXXIX. 351.

33. In such case, it having appeared that the obligor had determined to insist upon the forfeiture, as soon as the pay-day of the note had expired, and that, therefore, no subsequent tender would have been accepted, it was decreed that he should convey the land, a tender having been made prior to the suit. *Jones v. Robbins*, XXXIX. 351.

34. The obligor cannot set up in defence, that the obligee had not in readiness a mortgage deed of the same premises, provided in the condition to be given on receiving the conveyance, to secure the balance of the purchase money. *Russell v. Copeland*, XXX. 332.

35. The obligee's right of recovery cannot be defeated by a tender of a deed after action brought; and the damages in such action, are the value of the land, at the time it should have been conveyed. *Russell v. Copeland*, XXX. 332.

36. An action upon a bond, brought in the name of the joint obligees, by an assignee of one of them, may be discharged by the other. *Shaw v. Keep*, XXXIV. 199.

37. In a suit upon a bond, conditioned to save harmless from an outstanding mortgage, commenced after a breach, the damage occurring during its pendency may be included in the judgment; including the amount paid to ex-

tinguish the mortgage; counsel fees in the action against himself; the amount paid witnesses, and for taking depositions; and a reasonable sum for his personal expenses and time. *Gennings v. Norton*, xxxv. 308.

38. Where, in such a case, the conditional judgment upon the mortgage has been recovered against one to whom the obligee had, without covenants of warranty, conveyed a part of the land, and the obligee has paid the amount of the judgment:—*Held*, that as such payment lifted the mortgage from his own part of the land as well as from that of his grantee, he may recover for the amount due on the mortgage, in a suit upon the bond; but not for the cost in that judgment, the payment of the same having been voluntary. *Gennings v. Norton*, xxxv. 308.

39. The obligee in a bond, after he has assigned the same, can maintain no action upon it, without the consent or request of the party in interest. *Reed v. Nevins*, xxxviii. 193.

40. Where an action is commenced upon a bond given under the requirements of § 13 of c. 48, of Acts of 1853, and the selectmen of the town interested indorsed upon it their approval of the suit, no costs are recoverable by the defendants. *Saco v. Woodsum*, xxxix. 258.

41. In a suit upon a bond, stipulating not to engage in the iron-casting business within sixty miles of a place named, damages are recoverable, up to the time of trial. *Whitney v. Slayton*, xl. 224.

See ATTORNEYS, &c., 24.

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## BOOK ACCOUNT.

See EVIDENCE, 103, 108, 294, 310.

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## BOOM.

A sale of the “boom and piers” of a corporation, on execution against the company having authority to maintain it, passes nothing but the piers, logs and chains, and the purchaser takes no right in the lease-hold of some flats and shore, used by the company. *Rollins v. Clay*, xxxiii. 132.

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## BOUNDARIES OF LAND.

See DEED.

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## BOWLING ALLEY.

See INDICTMENT, 51, 52.

## BRIDGES.

1. If a grant of a charter be made, authorizing the building of a bridge, and there is contained in it a reservation or condition, with a view to the particular interest of an individual, such as exhibiting in view the rates of toll, he may avail himself of the omission, in defence of a suit against him to recover the penalty incurred by passing the bridge with the intent to avoid the payment of toll. *Propr's of S. W. B. Bridge v. Hahn*, xxviii. 300.

2. But if such grant be made on conditions which would not be for the particular benefit or accommodation of an individual, such as building the bridge in a different manner from that stipulated in the charter, the Legislature alone can interfere and inquire whether the condition has been performed; and an omission to comply strictly with the condition, cannot be set up by an individual, as an excuse for his own violation of the provisions of the Act. *Propr's of S. W. B. Bridge v. Hahn*, xxviii. 300. [Per WHITMAN, C. J., WELLS, J., dissenting.]

3. When one acts as toll-gatherer, and, as such, demands toll of a person passing the bridge, and his acts are adopted by the corporation, such person passing the bridge, with the intent to avoid the toll, cannot object in defence that the toll-gatherer was not legally chosen or appointed. *Propr's of S. W. B. Bridge v. Hahn*, xxviii. 300.

4. A charter authorizing defendants to build a bridge over tide waters, required them to build it of suitable materials, at least twenty-two feet wide, with a draw of sufficient width for vessels to pass through, &c., &c., and the whole should be kept in good and safe repair:—*Held*,—

1st. That the corporators were bound to provide all necessary apparatus for raising the draw:—

2d. That they were bound to raise the draw for the passage of vessels through it:—

3d. That for any neglect or unnecessary delay in so doing, they were liable to pay the damages sustained. *Patterson v. Propr's of E. Bridge*, xl. 404.

See AQUATIC RIGHTS, 12.

## BRIEF STATEMENT.

See ABATEMENT. PLEADING.

## BUCKFIELD B. RAILROAD.

See CONSTITUTIONAL LAW.



## BURGLARY.

That the acts, necessary to constitute the crime of burglary, were committed in the night time, is sufficiently stated by an averment in the indictment, that they were committed on a specified day, about the hour of twelve in the night of the same day. *State v. Seymour*, xxxvi. 225.

## BURTHEN OF PROOF.

See EVIDENCE.

## BY-LAWS.

1. A by-law of a town is invalid, if it be repugnant to the general law of the State. *Burke v. Bell*, xxxvi. 317.

2. No by-law of a corporation can enlarge its corporate powers. *Andrews v. W. M. F. Ins. Co.*, xxxvii. 256.

3. The establishment of a by-law, imposing a penalty for mutilating any ornamental tree planted in any of the streets or public places of the city of Portland, is within the authority granted by its charter. *State v. Merrill*, xxxvii. 329.

4. The by-laws of a corporation, not repugnant to the laws of the land, are obligatory. *Came v. Brigham*, xxxix. 35.

See INSURANCE.

## CARRIER.

See BAILMENT.

## CASE.

See MALICIOUS PROSECUTION.

## CERTIFICATE.

See ARREST. DEED.

## CERTIORARI.

1. Where part of the proceedings is so independent and disconnected with the residue, that it may be quashed, and leave the remainder an available judgment to the purposes for which it was intended, the Court may quash what is erroneous, and affirm the remainder. *Minot v. Cumberland Co. Com.*, xxviii. 121.

2. A certiorari will not be granted to quash the proceedings of the County Commissioners relative to the assessment of damages in the laying out of a town way, because the application was not filed in the Clerk's office within one year, where the application was found on the Clerk's files, without any entry of the time of filing, but dated before the expiration of the year, and no objection is made on that ground to the appointment of the committee, or to their proceeding to act in the matter. *Minot v. Cumberland Co. Com.*, xxviii. 121.

3. Nor where, there being no town agent, the selectmen agreed upon a committee instead of a jury, and the town appeared by attorney before the committee and before the commissioners on the return of the report, without making that, ground of objection. *Minot v. Cumberland Co. Com.*, xxviii. 121.

4. A general allegation in a petition for certiorari, that the committee were actuated by motives of gross partiality, is too uncertain and indefinite to require the consideration of the Court. *Minot v. Cumberland Co. Com.*, xxviii. 121.

5. If there are important irregularities in the location of a road, or in the assessment of taxes to build it, they can be taken advantage of only by certiorari. *Longfellow v. Quinby*, xxix. 196. *Banks v. Co. Com. of Cumberland and York*, xxix. 288.

6. Applications for writs of certiorari are addressed to the discretion of the Court; and if the alleged errors are found to be such as affect the forms, and not the substantial merits of a case, the writs will be refused, otherwise will be granted. *Lewiston v. Cumberland Co. Com.*, xxx. 19. *Inhab. of Waterville, Pet'rs*, xxxi. 506. *Cornville v. Co. Com.*, xxxiii. 237. *Dyer v. Lowell*, xxxiii. 260. *Detroit v. Co. Com.* xxxv. 373. *Oxford v. Co. Com.*, xliii. 257. *Smith v. Co. Com.*, xlii. 395. *Wayne v. Co. Com.*, xxxvii. 558. *W. Bath, Pet'rs*, xxxvi. 74.

7. If the adjudication of the County Commissioners does not contain a description of the road, so that it may be ascertained from the record, a writ of certiorari will be granted. *Lewiston v. Cumberland Co. Com.*, xxx. 19.

8. Certiorari is the proper remedy for the party injured, when there are errors in the proceedings of commissioners in setting off lands under a petition for partition. *Dyer v. Lowell*, xxx. 217.

9. It is not necessary that a petitioner for certiorari should be a party to the record, but only interested in the subject matter, upon which the record acts. *Dyer v. Lowell*, xxx. 217.

10. Certiorari cannot be refused where County Commissioners have rendered a judgment in a matter of which they had no jurisdiction, even if no injustice was done. *Bangor v. Penobscot Co. Com.*, xxx. 270.

11. Certiorari can be issued only for the relief of some injured party. *Pingree v. Co. Com.*, xxx. 351. *Strong v. Co. Com.*, xxxi. 578. *Rand v. Tobie*, xxxii. 450. *W. Bath, Pet'rs*, xxxvi. 74.

12. When County Commissioners, having located a highway upon a petition, close their proceedings earlier than is by law allowed, certiorari will be granted. *Windham, Pet'rs*, xxxii. 452.

13. When a return of the doings of the County Commissioners, in locating a highway, has not been recorded until the third ensuing term, certiorari will be granted, to quash the whole proceedings. *Cornville v. Co. Com.*, xxxiii. 237.

14. When certiorari is allowed and issued, the Court no longer has any discretionary power over the record brought under revision; and if material errors are found in it, it must be quashed. If errors were assigned in the petition, there need be no new assignment in the writ. *Dyer v. Lowell*, xxxiii. 260.

15. The record may be adjudged of, and acted upon by the examination of a copy, as well as of the original. *Dyer v. Lowell*, xxxiii. 260.

16. Grantees of land, who purchase, pending the petition for a writ of certiorari, are bound by the final adjudication of the process. *Dyer v. Lowell*, xxxiii. 260.

17. Certiorari will not be granted to quash County Commissioners' proceedings, if the Commissioners had jurisdiction, and if substantial justice were done by their action; although their record may not show, in all particulars, an exact compliance with the statute requirements. *W. Bath, Pet'rs*, xxxvi. 74.

18. That there was, in fact, such a compliance, may be proved *aliunde* the records. Such evidence, however, cannot be heard by the S. J. Court of the District, but must be presented to the S. J. Court for the county. *W. Bath, Pet'rs*, xxxvi. 74. *Smith v. Co. Com.*, xlii. 395.

19. To obtain a decision, whether the proceedings in establishing streets, have been legal, the process is by *certiorari*. Upon a bill in equity, praying an injunction, the proceedings will not be examined. *Baldwin v. Bangor*, xxxvi. 518.

20. Irregularities in the proceedings of County Commissioners, which will not prevent one, supposing himself to be aggrieved, from obtaining redress according to the course prescribed by law, furnish no authority for issuing a writ of certiorari. *Sumner v. Co. Com.* xxxvii. 112.

21. Although the Commissioners make an abatement, without authority, still the writ of certiorari will be denied, when it appears, from the whole case, that no injury has been done to the town by their proceedings. *Winslow, Pet'rs*, xxxvii. 561.

22. An omission to give notice of the time and place appointed to consider and adjudicate upon a petition for the location of a road across lands, not situated within an organized plantation or incorporated town, is sufficient cause for granting the writ of certiorari against County Commissioners. *Ware v. Co. Com.* xxxviii. 492.

23. If the presiding officer of a jury, empanelled to view and award damages for land taken by railroad companies, gives erroneous instructions to such jury, whether the party, suffering thereby without fault, may not have certiorari, *quere*. But, if he was not aggrieved by instructions given or withheld, the writ will be denied. *McKenney v. Co. Com.* xl. 136.

24. The omission of the records of County Commissioners to state that their return, pending proceedings, remained on file for the inspection of inter-

ested parties, is not a sufficient defect to authorize the issuing of a writ of certiorari. *Smith v. Co. Com.* XLII. 395.

25. Nor, where the record omits to state, that a committee, appointed by S. J. Court, to report upon the doings of County Commissioners, were disinterested men. *Smith v. Co. Com.* XLII. 395.

26. The hearing and determination upon a petition for a writ of certiorari, must be had at *nisi prius*. *Oxford v. Co. Com.* XLIII. 257.

## CHALLENGE.

See JURY.

## CHANCERY RULES.

See VOL. XXXVII. 596.

## CHARGE ON REAL ESTATE.

See MORTGAGE.

## CHEATING BY FALSE PRETENCES.

1. An indictment for obtaining property by false pretences, is defective unless it set forth the sale or exchange, and that the false pretences were made with a view to effect such a sale or exchange, and that by reason thereof, the party was induced to part with his property. *State v. Philbrick*, XXXI. 401.

2. Where a party falsely and fraudulently pretends that the property which he is parting with, belongs to himself and is unincumbered, and, at the same time, affirms that he will warrant it against incumbrances, an indictment may be sustained against him, if the false pretence, and not the warranty was the inducement which operated upon the other party. *State v. Dorr*, XXXIII. 498.

3. And the indictment need not allege, that the property parted with by the defendant, was of any value. *State v. Dorr*, XXXIII. 498.

See ACTION, 21.

## CHECKS.

1. To charge an indorser of a check drawn upon a bank, it must be presented within a reasonable time; and the holder is allowed until the next day after having received it, for that purpose. *Veazie Bank v. Winn*, XL. 60.

2. Where a check is dated at, and drawn upon a bank in Boston, and there is no evidence in the case, that before presentment it was held by any one residing out of that city, a presentment of it for payment, three days after it was drawn, is too late to charge the indorser. *Veazie Bank v. Winn*, XL. 60.

3. If a check on a banker be delivered to a person distant from the place where it is payable, it will suffice to forward it by post or otherwise, to some person residing in the latter, on the day after it is received; and it will suffice for him to present it on the third day. *Veazie Bank v. Winn*, XL. 60.

4. Bank checks, in form and effect, are bills of exchange. As between the holder and drawer, on failure of the drawee to pay, a demand at any time before the action is commenced will be sufficient, unless it appear that the drawer has sustained an injury. *Foster v. Paulk*, XLI. 425.

5. The indorser may be holden on proper notice, after the drawee upon legal demand has refused payment, or in any state of facts which amounts to a dishonor of the check. *Foster v. Paulk*, XLI. 425.

6. A check drawn on a bank in which the drawer has no funds, need not be presented at all, in order that an action may be maintained upon it. *Foster v. Paulk*, XLI. 425.

7. The holder of a check is *prima facie* the rightful owner of it; and he need not prove a consideration for it, unless he possesses it under suspicious circumstances. And an exchange of checks constitutes a good consideration in each case. *Foster v. Paulk*, XLI. 425.

8. A check is transferable by delivery. *Foster v. Paulk*, XLI. 425.

## CITY OF PORTLAND.

1. Sect. 3, c. 24, of the ordinances of the city of Portland, relating to bowling alleys, is legal and valid. *State v. Hay*, XXIX. 457.

2. The fees for committing persons to the house of correction in Portland, should be allowed by the County Commissioners, and paid out of the county treasury. And no action can be maintained to collect them, until they have been so audited and found due. *Huse v. Cumberland*, XXIX. 467.

3. The licensing of an individual to occupy a part of a public street exclusively for his own benefit by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to the city council of Portland, by the 9th section of its charter, or by any other statute. *Green v. Portland*, XXXII. 431.

4. No action lies against the city for a person suffering special damage in his comfort and business, by means of a railroad, so licensed, although the

party licensed may have given a bond to indemnify the city against liability for such damages. *Green v. Portland*, xxxii. 431.

5. The charter of the city of Portland authorized the city to establish such by-laws and regulations, not inconsistent with the constitution or laws of the State, as might be needful for the good order of the city: *State v. Merrill*, xxxvii. 329.

## CITIZENSHIP.

1. A residence by a father, within the United States, and an adherence to its government from the commencement of the Revolutionary war until after the definitive treaty of peace of 1783, conferred all the rights of citizenship both upon himself and upon his minor child residing in his family. *Calais v. Marshfield*, xxx. 511.

2. By the common law, allegiance is not a matter of individual choice. It attaches at the time and on account of birth, under circumstances in which the family owes allegiance, and is entitled to protection. *Calais v. Marshfield*, xxx. 511.

3. Although the child, whose citizenship is thus established, may have removed immediately after coming of age to act for himself, into a British province, and adhered to its government, he is, on his return to the United States, entitled to the rights of citizenship. *Calais v. Marshfield*, xxx. 511.

## CLAMS.

1. The general term "piscaria," includes all fisheries without any regard to their distinctive character, or to the method of taking the fish. *Moulton v. Libby*, xxxvii. 472.

2. Shell fisheries, including the digging of clams, are embraced in the common right of the people to fish in the sea, creeks and arms thereof. *Moulton v. Libby*, xxxvii. 472.

3. One accustomed to dig clams for sixty years in certain flats, subject to the flux and reflux of the tide, cannot set up such acts as evidence of an exclusive right within such limits. *Moulton v. Libby*, xxxvii. 472.

## CLERICAL ERRORS.

See REPLEVIN.

## COLLECTOR.

1. To the validity of a sale of real estate, made by a collector, it is indispensable that he take the oath of office before acting therein. *Payson v. Hall*, xxx. 319.

2. The collector of taxes of a town has the same powers, and is under the same obligations, to collect school district taxes, as in cases of town taxes. *Smyth v. Titcomb*, xxxi. 272.

3. A collector of taxes, who receives a surplus of money upon the sale of property for a tax, and who omits to render to the owner, "an account in writing of the sale and charges;" is a trespasser *ab initio*. *Blanchard v. Dow*, xxxii. 557.

4. A collector of taxes is liable in trespass, if he sell upon his warrant a greater number of the chattels than sufficient to pay the tax, with the fees and charges. *Williamson v. Dow*, xxxii. 559.

5. A sale, made by a collector for payment of an illegal tax, gives no title. *Coombs v. Warren*, xxxiv. 89.

6. A collector is authorized to receive payment for land sold to collect the taxes assessed upon it, in cash only, and he becomes accountable to the town for cash. *Packard v. New Limerick*, xxxiv. 266.

7. The risk of title in a collector's sale, is upon the collector and purchaser, and not upon the town. *Packard v. New Limerick*, xxxiv. 266.

8. A collector of taxes legally qualified, acting within the scope of his powers, under a warrant from competent authority, is protected against all illegality but his own; and his return is *prima facie* evidence in his favor of the facts therein stated. *Caldwell v. Hawkins*, xl. 526.

9. No recovery can be had upon the bond of a collector for a failure to collect taxes committed to him by a warrant, which, in terms, gives no authority to distrain or commit. *Frankfort v. White*, xli. 537.

10. A clause in such warrant, purporting to extend to it the powers granted in a previous one to the same person in due form, would not make it valid. *Frankfort v. White*, xli. 537.

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 COLONIAL ORDINANCE.

By virtue of the proviso contained in the Colonial Ordinance of 1641, persons had a right to use the shore of the Penobscot river, including the right of mooring their vessels thereon, and of discharging and taking in their cargoes. *State v. Wilson*, xlii. 9.

See FLATS, 1, 2.

## COMMERCE.

1. The power given to Congress, to regulate commerce with foreign nations and among the States, includes the power to regulate navigation with foreign nations and among the States, and extends both to salt and fresh waters, and beyond, as well as within, the ebb and flow of tides. *Moor v. Veazie*, xxxii. 343.

2. It is however restricted to such waters as can be employed in commerce between a State and foreign nations, or some other State; and does not extend to those waters within a State, from which a vessel cannot be navigated to a foreign port or to another State. *Moor v. Veazie*, xxxii. 343.

3. The power given to Congress to regulate commerce with Indian tribes does not include navigation with the Penobscot Indians, or with any of the Indian tribes whatever. It is confined to that sort of trade, of which navigation constitutes no part. *Moor v. Veazie*, xxxii. 343.

4. A coasting license, granted to a vessel, plying upon the interior waters, from which it could not reach another State or a foreign nation, is unauthorized and inoperative. *Moor v. Veazie*, xxxii. 343.

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COMMISSIONERS.

See INSOLVENCY. PETITION FOR PARTITION.

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COMMITTEE.

To bind a town by the doings of one of its committees, a majority of the committee must concur. If, within the scope of a committee's appointment, a minority authorize a deviation from the contract, and the majority direct a return to the original, promising verbally to pay the contractor what was right for his loss, in consequence of his alteration, it is a ratification, and will bind the town. *Hanson v. Dexter*, xxxvi. 516.

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COMMON SELLER.

See LIQUOR.

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COMMON VICTUALER.

See INN-HOLDER AND COMMON VICTUALER.



## COMPLAINT.

1. If, under c. 205, of the Acts of 1846, a complaint allege a sale to have been in a less quantity than is allowed to be imported, it need not specify whether the liquor was or was not imported. *State v. Crowell*, xxx. 115.

2. Nor is it necessary to allege by whom the defendant made the sale. *State v. Stewart*, xxxi. 515. *State v. Brown*, xxxi. 520.

3. The exception, in c. 205, § 1, of the Act of 1846, is sufficiently negated by an averment that the liquor was not imported into the U. S. from any foreign port or place. And it is sufficient to aver that the liquor was sold to Mrs. B., without giving the christian name. *State v. Brown*, xxxi. 522.

4. An allegation in a complaint, that it was sworn to before the justice of a town court, and within the proper county, is, in the absence of other proof, sufficiently evidential of the justice's jurisdiction. *State v. Coombs*, xxxii. 526.

5. A complaint merely charging "the crime of having sold a quantity of spirituous liquors," charges no offence. The Court will not assume, that acts, which may be consistent with innocence, and are not charged to be in violation of law, are criminal, merely because they are so denominated by the magistrate. *State v. Lane*, xxxiii. 536.

6. To obtain a forfeiture under c. 211, of the Acts of 1851, the complaint should distinctly aver, that the liquors are intended for sale in the city, town or place, in which they are kept or deposited, and by some person not authorized to sell the same in such city, town or place, under the provisions of the Act. It need not aver, however, that they were intended for sale in the shop or other building, wherein they were kept or deposited. *State v. Robinson*, xxxiii. 564.

7. No person can be put on trial for an offence without any written complaint or charge made against him. Where the complaint names no person as the owner, keeper or claimant of the liquors, the swearing of a jury in the form as of a criminal trial, is irregular; and their finding the defendant guilty, would be merely void. *State v. Robinson*, xxxiii. 564.

8. A complaint must allege with certainty the time when the offence was committed; but the proof need not be confined to that time. An allegation, that the offence was committed "on or about" a specified day, is not sufficient. *State v. Baker*, xxxiv. 52.

9. A complaint, employing Arabic numerals, or long used and well understood abbreviations, to express the time when an offence was committed, or when the complaint was made and sworn to, is good. *State v. Reed*, xxxv. 489.

10. "One glass of spirituous liquor" is a sufficient description in a complaint for the quantity sold. *State v. Reed*, xxxv. 489.

11. In a complaint for violating c. 211, § 4, of the Acts of 1851, it is lawful to insert two or more offences of the same nature, in different counts. *Lord v. State*, xxxvii. 177.

12. And where a complaint under that section contained several counts for apparently distinct offences, and on one only was the respondent convicted before the justice, and fined ten dollars, from which judgment he appealed, and in the appellate court was convicted, according to the record, of the matters set forth in the complaint, and fined twenty dollars; the record shows

no error, even if a double penalty could not lawfully be imposed. *Lord v. State*, xxxvii. 177.

13. In a complaint, under a by-law, imposing a penalty for mutilating any ornamental tree, planted in any of the streets or public places of the city of Portland, it is not necessary to allege, that the mutilation was malicious, careless or wanton. *State v. Merrill*, xxxvii. 329.

14. Before a magistrate can issue a warrant to search for spirituous liquors, *a building*, part of which is used as a store and part for a dwellinghouse, it should first be shown to him, by the testimony of witnesses, that there was reasonable ground for believing that such liquors were kept in such dwellinghouse, or its appurtenances, for illegal sale. Without such preliminary testimony, the warrant and proceedings are void. *State v. Spencer*, xxxviii. 30.

15. On a complaint under c. 48, of the Acts of 1853, praying for a warrant to search for spirituous liquors, where the name of the person by whom the liquors are alleged to be deposited, is stated, the warrant issued thereon must require the officer to arrest such person, and have him forthwith before the justice issuing it. *State v. Leach*, xxxviii. 432.

16. If the warrant in such case only require the respondent to be summoned, and such is the prayer of the complaint, they are unauthorized, and in violation of the law. *State v. Leach*, xxxviii. 432.

17. Where such complaint and warrant, by leave of the justice, were amended, and it then appeared that the complaint was made and warrant issued on the fifth, commanding the officer to arrest the respondent and have him before the justice on the eighteenth of the same month:—*Held*, the complaint and warrant were illegal and void. *State v. Leach*, xxxviii. 432.

18. If a positive charge, verified by the complainant's oath, according to the best of his knowledge and belief, is made in a complaint before a magistrate, it will authorize him to issue his warrant to arrest thereon. *State v. Hobbs*, xxxix. 212.

19. The facts disclosed on oath, by a complainant to the magistrate, to satisfy him that a warrant should be issued, need not be stated in the complaint or warrant, excepting in those cases specially required by the statute. *State v. Hobbs*, xxxix. 212.

20. The offence to which the accused, in a criminal proceeding, is called to answer, must be distinctly alleged. But a complaint, that the respondent kept or deposited certain intoxicating liquors, intended for unlawful sale, in a certain place, or said liquors were kept or deposited, &c., by some other person with his consent, is insufficient for uncertainty. *State v. Moran*, xl. 129.

## COMPOSITION OF CLAIMS.

1. The term "settled" as used in c. 213, of the Acts of 1851, means an intention to *extinguish* the claim, and not a liquidation or adjustment of the amount due upon it. *Austin v. Smith*, xxxix. 203.

2. Where payment of part only of an acknowledged debt is made, and no consideration is disclosed for an agreement to forbear to collect the amount not paid, an action lies to recover such balance; an agreement not to sue or

for delay of payment not being embraced by the statute provisions. *Austin v. Smith*, xxxix. 203.

See ACTION, 77.

## CONDITION.

- I. WHEN PRECEDENT, OR SUBSEQUENT.
- II. GENERALLY.

### I. WHEN PRECEDENT, OR SUBSEQUENT.

1. The title to lands, granted by the Sovereign Power, upon a condition to be subsequently performed within a limited time, will remain valid, until such grantor, by some Legislative Act, shall avail itself of a forfeiture. *Little v. Watson*, xxxii. 214.

2. The time allowed for performing such a condition, prescribed in a grant, made by Massachusetts prior to the separation, of lands situated in this State, may be extended by the Legislature of that Commonwealth, notwithstanding the separation. *Little v. Watson*, xxxii. 214.

3. A grant of land, conditioned for a subsequent payment to be made therefor, though it reserves, toward such payment, a lien upon the lumber which the grantee, may take therefrom, is a grant upon a condition subsequent. Until an entry for condition broken, the land continues vested in the grantee. *Spofford v. True*, xxxiii. 283. *Hall v. Pickering*, xl. 548.

4. In a promise by a creditor to his debtor, that he would relinquish a part of the debt, upon payment of the residue at a specified time, satisfactory security being furnished, there is a condition precedent to be performed by the debtor. *Little v. Hobbs*, xxxiv. 357.

5. Such a condition is not fulfilled by a tender, though seasonable, of the security, as a payment. A neglect by the debtor to pay the agreed part at the pay-day, absolves the creditor from his promise to relinquish the residue. *Little v. Hobbs*, xxxiv. 357.

6. In a deed conveying land with a right to immediate possession, a condition that a third person shall be allowed to have the use and occupation of it for life, if he shall request it, is a condition subsequent. And in order to revest the estate, after breach of a condition subsequent, an entry by the grantor or his assigns, is indispensable. *Tallman v. Snow*, xxxv. 342. *Hall v. Pickering*, xl. 548.

7. An unsealed agreement to convey land to the plaintiff at a special day, and reciting that it was in consideration of a sum of money paid by the plaintiff and of another sum to be paid by a third person, (who in fact had never agreed to pay it,) is upon a condition that the latter sum be paid before the conveyance. *Gilman v. Schwartz*, xxxvi. 541.

### II. GENERALLY.

- 8. A party, for whose benefit a condition subsequent is attached to a devise

of real estate, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture. Such party may waive the forfeiture; and acts, inconsistent with the claim of forfeiture, may sufficiently evidence such waiver. *Andrews v. Senter*, xxxii. 394.

9. It is a general rule in a conveyance of real estate on certain conditions, that any one interested in the conditions or in the land, may perform them. *Wilson v. Wilson*, xxxviii. 18.

10. Where the condition of a grant of land is, that the grantee shall maintain and support in a comfortable manner, persons therein named, no personal trust is charged upon him, and the support may be furnished by others. *Wilson v. Wilson*, xxxviii. 18.

### CONFUSION OF GOODS.

1. The doctrine of "confusion of goods," may apply to mill-logs and other lumber. *Hesseltine v. Stockwell*, xxx. 237. *Bryant v. Ware*, xxx. 295.

2. Confusion of goods has occurred when the intermixture is such that each one's property can no longer be distinguished. *Hesseltine v. Stockwell*, xxx. 237.

3. When there has been a confusion of goods, the common law assigns the whole property to the innocent party, without liability to account, except in certain cases or conditions of the property. *Hesseltine v. Stockwell*, xxx. 237.

4. There is no forfeiture, if the goods have been intermixed without fraud. And even in cases of fraudulent intermixture, there is no forfeiture if the goods be of equal value. Each owner is entitled to his proportion of the whole. *Hesseltine v. Stockwell*, xxx. 237.

### CONSIDERATION.

See *BILLS, &c.* *CONTRACT*, 31, 37.

### CONSIGNMENT.

See *BAILMENT*. *SHIPPING*, 64-67.

### CONSPIRACY.

1. In a charge for a conspiracy, if the act to be done is in itself illegal, the indictment need not set forth the means by which it was to be accomplished.

But if the act is not in itself unlawful, but becomes so from the purposes for which, and the means by which, it is to be done, the indictment must set out enough to show the illegality. *State v. Bartlett*, xxx. 132. *State v. Ripley*, xxxi. 386.

2. The crime of conspiracy to obstruct, hinder and injure the administration of public justice consists in the unlawful purpose, and not by illegal and criminal means to effect a purpose, not unlawful. *State v. Bartlett*, xxx. 132.

3. An indictment, charging a conspiracy to hinder and injure the administration of public justice, by obtaining a counterfeit bill from the hands of a person to whom it had been uttered, so that it could not be had as evidence upon a criminal prosecution, is sufficient. It need not allege the means used, nor that the bill was in the hands of the person named, nor need the bill be described, nor need it be alleged that the defendants knew that it had been uttered wilfully. *State v. Bartlett*, xxx. 132.

4. A conspiracy unlawfully to do an injury to the person of an individual, or to do any unlawful act, injurious to the administration of public justice, is a statute offence; and no overt act is necessary to constitute the crime, for it is a complete and consummate offence, of itself. *State v. Ripley*, xxxi. 386.

5. In conspiracy, acts may be evidence of the combination, and if the combination be unlawful, the acts need not be set forth for any other purpose. *State v. Ripley*, xxxi. 386.

6. In an indictment for a conspiracy, if the means, by which the alleged purpose was to be accomplished, be not set out, the purpose itself should appear to have been unequivocally illegal and forbidden by law. It is not enough, that it sufficiently describe the crime attempted to be charged; but it should also state the facts necessary to constitute the offence. *State v. Hewett*, xxxi. 396.

7. Where such facts are not stated, the indictment does not sufficiently charge an offence at common law. *State v. Hewett*, xxxi. 396.

8. To conspire to "injure the property" of an individual, is a crime against the statute. But it must be an injury to the property *in rem*, by which it is destroyed, or its value diminished; and not such as might tend to lessen the general property of another. *State v. Hewett*, xxxi. 396.

See ACTION, 67, 69.

## CONSTABLE.

1. Neither by the common law, nor by § 18 of c. 104, of R. S. of 1841, do actions of tort for the misfeasances of sheriffs or constables survive against their legal representatives. *Gent v. Gray*, xxix. 462.

2. By R. S. of 1841, c. 104, a constable is authorized to serve "writs and precepts," in personal actions, wherein the sum demanded does not exceed one hundred dollars. And the word "precept" includes executions. *Morrell v. Cook*, xxxi. 120. *Berry v. Staples*, xxxiii. 494. *Morrell v. Cook*, xxxv. 207.

3. A constable may attach real estate upon a writ in such action, and in the service of the execution he may levy real estate. *Morrell v. Cook*, xxxi. 120. *Morrell v. Cook*, xxxv. 207.

4. The duty and authority of constables in levying executions, within their jurisdiction, upon real estate, are co-extensive with those of sheriffs and their deputies. *Morrell v. Cook*, xxxi. 120.

5. Any writ or precept in a personal action, wherein the damages demanded do not exceed one hundred dollars, may be served by the constable of a town, upon any person within that town, though such person may be an inhabitant of another town. *Blanchard v. Day*, xxxi. 494.

6. A constable may make a legal service of a writ within his jurisdiction, though it is not directed to him. The direction, being matter of form, cannot be necessary to give it validity. *Morrell v. Cook*, xxxv. 207.

7. Constables can only be chosen by a major vote of the votes cast at the meeting. And to constitute an election to such office, it is essential that the person claiming to be chosen, should at the time he was voted for be presented distinctly to the mind of each elector. *Crowell v. Whittier*, xxxix. 530.

8. The vote of a town, that whoever should make the lowest bid for collecting the taxes, should be the constable, will not authorize the person making such bid to perform the duties of that office. *Crowell v. Whittier*, xxxix. 530.

## CONSTITUTIONAL LAW.

- I. ORGANIZATION OF THE DEPARTMENTS OF GOVERNMENT.
- II. LAWS AFFECTING CONTRACTS OR VESTED RIGHTS.
- III. EX POST FACTO, AND RETROSPECTIVE LAWS.
- IV. LAWS TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.
- V. LAWS AFFECTED BY THE DECLARATION OF RIGHTS.
- VI. OTHER LAWS AND GENERAL PRINCIPLES.

### I. ORGANIZATION OF THE DEPARTMENTS OF GOVERNMENT.

1. The provisions of sect. 5, Art. 4, part 2d, of the constitution, require the Senate to determine who are elected Senators in a district, before other persons can, by joint ballot, be elected Senators for such district. *Opinion of Judges*, xxxv. 563.

2. Said section contemplates that the Senate shall determine who are elected Senators in all the districts, and that all existing vacancies should be ascertained and declared before proceeding to such election. *Opinion of Judges*, xxxv. 563.

3. Each House may rightfully refuse to meet the other to make such elections by joint ballot, until all existing vacancies have been so ascertained and declared; while this mode is not regarded as so essential, that Senators could not, by the agreement of both Houses, be legally elected before all existing vacancies had been so ascertained and declared. *Opinion of the Judges*, RICE, J., dissenting, xxxv. 563.

4. The provisions of that section do not contemplate a meeting of the members of the two Houses, to make such elections by joint ballot, for the purpose of filling a part only of the vacancies existing in the Senate on the

first Wednesday of January. Those provisions are not regarded as forbidding such a course, when adopted by the agreement of both Houses. *Opinion of Judges, RICE, J., dissenting, xxxv. 563.*

5. A Senator, elected by the members of the House of Representatives, and such Senators as shall have been elected, to fill a vacancy existing on the first Wednesday of January, is not entitled to vote in a meeting or convention of the members of the two Houses, held for the purpose of filling vacancies in the Senate, existing on the first Wednesday of January. *Opinion of Judges, RICE, J., dissenting, xxxv. 563.*

6. When less than a majority of the whole number of Senators, required by law, appear, by the lists returned to the office of the Secretary of State, to be elected, such Senators, less than a majority, constitute "the Senate," in the sense in which that term is used in the constitution. *Opinion of Judges, xxxv. 563.*

7. Such Senators, less than a majority, can exercise the powers, and perform all the duties, required by the constitution to be exercised by the Senate to procure an organization of that House. *Opinion of Judges, xxxv. 563.*

8. Such Senators, less than a majority, can decide upon the legality of election returns, as shown by the lists returned to the Secretary's office, receive evidence of election other than is contained in such lists, and determine elections upon such evidence. *Opinion of Judges, xxxv. 563.*

9. Such Senators can declare vacancies in the Senate, and determine who are constitutional candidates. And they may also determine upon what evidence they will do it. *Opinion of Judges, xxxv. 563.*

10. When the House of Representatives has been duly organized, and a minority only of the whole number of Senators, required by law, appear to be elected, the members of the House, and a minority of such Senators as appear to be elected, cannot legally form a convention for filling vacancies in the Senate, all of such Senators being duly notified, but a majority refusing to act. *Opinion of Judges, xxxv. 563.*

## II. LAWS AFFECTING CONTRACTS OR VESTED RIGHTS.

11. Chapter 72, of the Acts of 1848, creating a lien on lumber, &c., is no abridgment of the rights of the citizen, secured to him by § 1, art. 1, of "acquiring, possessing and protecting property." *Spofford v. True, xxxiii. 283.*

See CONTRACT, 8.

## III. EX POST FACTO, AND RETROSPECTIVE LAWS.

12. If § 10, of c. 144, of R. S. of 1841, had been clearly retrospective, it would have been unconstitutional; but it was prospective only, and hence constitutional. *Given v. Marr, xxvii. 212.*

13. The Legislature has power to pass laws altering, modifying or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, relating to *ex post facto* laws. *Lord v. Chadbourne, xlii. 429.*

## IV. LAWS TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

14. An article in the constitution provides, that "private property shall not be taken for public use, without just compensation. By the "taking," within the scope of that provision, is meant such an appropriation as deprives the owner of his title or a part of his title. *Cushman v. Smith*, xxxiv. 247. *Jordan v. Woodward*, xl. 317. *Nichols v. S. & K. R. R. Co.*, xliii. 356.

15. That provision, when applied to real estate, prevents the acquisition of any title or easement or permanent appropriation without the actual payment or tender of a just compensation. *Cushman v. Smith*, xxxiv. 247. *Nichols v. S. & K. R. R. Co.*, xliii. 356.

16. It does not prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or to an easement in it. *Cushman v. Smith*, xxxiv. 247. *Nichols v. S. & K. R. R. Co.*, xliii. 356.

17. The right to such temporary occupation as an incipient proceeding, will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it. *Cushman v. Smith*, xxxiv. 247. *Nichols v. S. & K. R. R. Co.*, xliii. 356.

18. The mill Act, c. 126, of R. S. of 1841, is constitutional. Though, if it were a new question, its constitutionality might well be doubted. It pushes the power of eminent domain to the very verge of constitutional inhibition. *Jordan v. Woodward*, xl. 317.

19. The reasons for the policy of such legislation have long since ceased to be potential, and the extension of the rights of mill-owners over private property cannot be allowed by implication:—Hence, the riparian proprietor of lands overflowed by means of a dam, may occupy the land so overflowed, by erecting piers thereon and constructing booms, and thereby exclude the lumber of the mill-owner. *Jordan v. Woodward*, xl. 317.

## V. LAWS AFFECTED BY THE DECLARATION OF RIGHTS.

20. The constitutional requirement, that "a special designation of the place to be searched" shall be made, is not answered by words, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. *State v. Robinson*, xxxiii. 564.

21. Under that provision, an article to be searched for, may be described by its generic name, if it have no peculiar marks or qualities by which it can be distinguished from other articles of the same general name. *State v. Robinson*, xxxiii. 564.

22. "The law of the land," as used in the Constitution, does not mean an Act of the Legislature; but affirms the right of trial according to the process and proceedings of the common law. *Saco v. Wentworth*, xxxvii. 165.

24. An Act of the Legislature, which renders it difficult for the accused to obtain the privilege of a trial by jury, beyond what public necessity requires, impairs individual rights, and is inconsistent with the Constitution. *Saco v. Wentworth*, xxxvii. 165.

25. An Act which requires conditions, for the purpose of preventing a trial by jury, is opposed to the spirit of the constitution, and so far as it



deprives one of this means of protection, is void. *Saco v. Wentworth*, xxxvii. 165.

26. That part of § 6, of c. 211, of the Acts of 1851, which requires that a bond shall be given to the town, &c., impairs the right secured to the accused, by Art. 1, § 6, of the constitution, and is inoperative and void. *Saco v. Wentworth*, xxxvii. 165.

27. A law is not unconstitutional, because it may prohibit what one may conscientiously think right, or require what he may conscientiously think wrong. *Donahoe v. Richards*, xxxviii. 379.

28. A requirement by the Sup. School Committee, that the Protestant version of the Bible shall be read in the public schools of their town, by the scholars who are able to read, is in violation of no constitutional provision, and is binding upon all the members of the schools, although composed of divers religious sects. *Donahoe v. Richards*, xxxviii. 379.

29. Art. 1, § 6, which secures to the accused the right to have compulsory process for obtaining witnesses in his favor, does not authorize the accused to require of the State, payment of the fees of the witnesses necessary in the defence; it is only for the process by which they may be summoned. *State v. Waters*, xxxix. 54.

30. The Act of 1853, c. 48, for the "suppression of drinking-houses," &c., does not violate any of the principles in the declaration of rights. *Gray v. Kimball*, xlii. 299.

## VI. OTHER LAWS AND GENERAL PRINCIPLES.

31. The Legislature may authorize the construction of a bridge across navigable or tide waters, although the navigation may thereby be impaired or injured. *Brown v. Chadbourne*, xxxi. 9. *Rogers v. K. & P. R. R. Co.*, xxxv. 319. *Moor v. Veazie*, xxxi. 360. *Knox v. Chaloner*, xlii. 150. *State v. Freeport*, xliii. 198.

32. Upon a bill in equity, praying for an injunction, an Act of the Legislature ought not to be adjudged unconstitutional, on a preliminary hearing for the injunction, and before an examination into the general merits of the bill. *Deering v. Y. & C. R. R. Co.*, xxxi. 172.

33. A prayer for an injunction, grounded upon an allegation, that the powers granted by the charter, were in violation of the constitution, must be denied, until the general merits of the bill should be examined. *Deering v. Y. & C. R. R. Co.*, xxxi. 172.

34. An action to recover damage for destroying communication between parts of land which lie upon the opposite sides of a railroad track, either by taking the strip of land for the site of the road, or by the erection thereon of an embankment, proceeds, not upon the ground that the land was illegally taken, but that the power, granted by the charter, had been transcended or abused. It therefore presents no basis for a decision as to the constitutionality of that power. *Mason v. Ken. & P. R. R. Co.*, xxxi. 215.

35. On a summary hearing, upon a petition for a mandamus, the Court will not determine the constitutionality of a law, involving merely the rights of third persons. *Smyth v. Titcomb*, xxxi. 272.

36. An Act of the Legislature granting to certain persons the exclusive right to navigate certain portions of the Penobscot river, above tide waters, for a

certain time, is constitutional. *Moor v. Veazie*, xxxi. 360. *Moor v. Veazie*, xxxii. 343.

37. The constitution of this State invests the Legislature with "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people, not repugnant to said constitution or that of the U. S." *Moor v. Veazie*, xxxii. 343.

38. Whether an enactment is reasonable, or for the benefit of the people, it is for the Legislature alone to decide. *Moor v. Veazie*, xxxii. 343.

39. It is not violative of any constitutional provision:—

1st. That one of the justices of the peace resident in a certain town should be selected to exercise, exclusively, the powers of that office within the town:

2d. That such selection should be made by the voters of the town: or,

3d. That the one so selected should be vested with some superadded powers, by an Act of the Legislature of which he was a member. *State v. Coombs*, xxxii. 526.

40. It is competent for the State, by legislative enactment, operating prospectively, to determine, that articles, which are injurious to the public health or morals, shall not constitute property within its jurisdiction. *Preston v. Drew*, xxxiii. 558. *State v. Gurney*, xxxvii. 156. *Gray v. Kimball*, xlii. 299.

41. If it so conclude in relation to spirituous and intoxicating liquors, when designed to be used as a beverage, the conclusion would be justified by the experience and history of man, and would furnish no occasion to complain that any provision of the constitution had been violated. *Preston v. Drew*, xxxiii. 558.

42. The Legislature has not constitutional power, after a general representative apportionment has been made, in conformity with the constitution, to alter the Representative Districts so established, until the next general apportionment. *Opinion of Judges*, xxxiii. 587.

43. It was not competent for the Legislature of 1850, to incorporate the town of Kennebec, in the County of Kennebec, from parts of five different Representative Districts, as established by the last general apportionment, and annex said town to the Representative District of Readfield and Fayette, so as to give the inhabitants of said town of Kennebec the right to vote in the election of representatives to the Legislature, with the inhabitants of Readfield and Fayette. *Opinion of Judges*, xxxiii. 587.

44. When the Governor and Council, whose duty it is to open and compare the copies of the records of votes given for County Commissioners, under the Act of Feb. 22d, 1842, have performed that duty, and have ascertained and determined who have been elected, and have duly commissioned the persons so ascertained and determined to be elected, their proceedings cannot be revised by a subsequent Governor and Council. *Opinion of Judges*, xxxviii. 597.

45. If the Governor and Council, so opening and comparing the votes, ascertain that one A. C. D. is elected, and a commission issue accordingly; and a subsequent Executive find there is no such man, but that the voters intended their votes for A. E. D., it is not competent for them to issue a new commission to A. E. D., nor to throw out the votes for A. C. D. and issue a new commission to such person who is eligible to said office, as shall appear to have the highest number of votes; but under that state of facts, there is a vacancy which the subsequent Executive may fill by appointment. *Opinion of Judges*, xxxviii. 597.

46. So much of the 13th § of c. 48, of the Acts of 1853, as requires the giving of the bond provided for in § 6, of c. 211, of the Acts of 1851, is unconstitutional and void. *Saco v. Woodsum*, xxxix. 258.

47. A judicial tribunal cannot declare void, a law passed by the Legislature and clearly within the scope of its constitutional powers, because the law, in the opinion of the Court, is contrary to the principles of natural justice. *Lord v. Chadbourne*, xlii. 429.

See BANK, 24.

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## CONTAGIOUS SICKNESS.

A town is not liable to pay a physician for his services, in attending upon persons sick with a contagious disease, without his being employed by the selectmen of the town; although they have taken measures, under c. 21, of the R. S. of 1841, to prevent the access of others to the place, and have appointed a person to superintend the house and take care of its inmates. The knowledge of, and assent to, his performing his services, is not enough. *Kellog v. St. George*, xxviii. 255.

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## CONTEMPT OF COURT.

A party to a bill, who, in his answer, professes himself ready to pay a note which he had given, when it could be done with safety to himself; and, after the decree that the same should be paid to a receiver appointed by the Court, sets up a prior part payment of the note, and refuses to pay the full amount, is liable and punishable for a contempt of Court. *Gilmore v. Gilmore*, xl. 50.

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## CONTINGENT REMAINDER.

See WASTE.

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## CONTRACT.

- I. WHAT WILL CONSTITUTE OR PROVE A CONTRACT.
- II. VALIDITY OF.
- III. CONSIDERATION.
- IV. RECISION.
- V. WAIVER, MERGER OR DISCHARGE.
- VI. PERFORMANCE AND BREACH.
- VII. CONSTRUCTION.

## I. WHAT WILL CONSTITUTE OR PROVE A CONTRACT.

1. From the mere occupation of the plaintiff's land, (no permission, or recognition of his title being shown,) the law implies no promise to pay him for the use of it. *Eastman v. Howard*, xxx. 58.

2. A written agreement by a debtor, that in consideration of his indebtedness he will let his creditor have certain specified articles at a time and place specified, at market price, is a valid contract, and imposing on the debtor the duty to set out the articles at the time and place agreed. *Bates v. Churchill*, xxxii. 31.

3. A promise, not in writing, made by a debtor, in consideration of a pay-day extended, that he will not take advantage of the statute of limitations, will not support an action. *Hodgdon v. Chase*, xxxii. 169.

4. A promise by a debtor, made without legal consideration, that before the pay-day of his debt arrives, he will make a partial payment, does not expedite the creditor's right of action. *Young v. Ward*, xxxiii. 359.

5. Neither will a partial payment in advance, expedite the right of action for the balance. *Young v. Ward*, xxxiii. 359.

6. Where a written instrument, intended as an agreement to be signed by both parties, shows that services were to be rendered by the plaintiff, for which he was to be paid at a future day, the term of credit is binding upon him, if he admit the services to have been performed under that agreement, although the instrument was signed by himself only. *Young v. Ward*, xxxiii. 359.

7. The law will not raise an implied contract, when there existed no legal right to make an express contract. *Simpson v. Bowden*, xxxiii. 549.

8. Private corporations exist by legislative grants, conferring powers, rights and privileges, for special purposes; and these grants are essentially contracts, which the Legislature cannot impair or change without the consent of the corporation. *Yarmouth v. North Yarmouth*, xxxiv. 411.

9. A party in interest, for whose benefit a promise has been made in the name of his agent, may maintain a suit thereon in his own name; but only when there was a consideration derived by one party from another party to the suit. *M. H. Co. v. Coyle*, xxxv. 405.

10. One, uniting with others in a joint stock association for a business enterprise, by signing a general subscription-promise, but making no provision for becoming a corporation, cannot be held by the mere force of the subscription to pay his shares, in a suit by the corporation, afterwards created for completing the enterprise, and consisting of some or all of the other associates, there being no privity. *Machias H. Co. v. Coyle*, xxxv. 405.

11. In such a suit, no liability can be deduced from expenditures made by the unincorporated association; there being no privity; nor from expenditures made by the corporation itself, there being no consideration. *Machias H. Co. v. Coyle*, xxxv. 405.

12. A person entering a manufacturing establishment, as an operative, with a knowledge that its regulations provide for a forfeiture of wages, in case of willful non-compliance, is considered to have assented to such provision, though he have not signed it; and such an assent constitutes a valid contract. *Harmon v. S. F. Manuf'g Co.*, xxxv. 447.

13. Where the parties to a suit pending in court, agree in writing to refer it, with stipulations that it shall be withdrawn, each party to pay his own

cost; if one of the referees declines to act, the agreement becomes inoperative, and the action may stand for trial. *Chapman v. Seccomb*, xxxvi. 102.

## II. VALIDITY OF A CONTRACT.

14. Where one had not acquired a lawful right to float his logs over the land of another, without his consent, through an artificial channel made by the owner, and is resisted and obstructed in the use of such channel, and makes a contract with him to pay a sum of money for the permission to float his logs, such contract is valid. *Dwinel v. Barnard*, xxviii. 554. *WELLS, J.*, dissenting.

15. A contract may be avoided by proof of defendant's insanity at the time of contracting. *Thornton v. Appleton*, xxix. 298.

16. A promise, made in consideration that the promisee would procure the discontinuance of an indictment, in which he was prosecutor, is invalid. *Shaw v. Reed*, xxx. 105.

17. A contract in violation of a statute, when introduced as evidence of a right to recover thereon, may be effectually resisted by a party to it, or by one in legal privity, but not by a mere stranger. *Ellsworth v. Mitchell*, xxxi. 247.

18. Where a contract not *malum in se*, made in violation of a statute, has been executed, a party cannot recover it back, unless he can show, that it was not paid for value actually received, but was obtained wrongfully or by undue advantage; or unless he can exhibit a statute expressly authorizing such a recovery. *Ellsworth v. Mitchell*, xxxi. 247.

19. A contract for the sale and purchase of pressed hay, to be performed at a future day, upon which the delivery is to be made, cannot be enforced by the seller, if the hay at the time of delivery was not branded. *Buxton v. Hamblen*, xxxii. 448.

20. No action can be maintained for the breach of a contract to employ the plaintiff, at stipulated wages, unless there was some stipulation as to the length of time, for which the employment was to continue. *Blaisdell v. Lewis*, xxxii. 515.

21. A contract obtained by fraudulent representations cannot be sustained by the fraudulent party to the injury of the party imposed upon. *Pratt v. Philbrook*, xxxiii. 17. *Pratt v. Philbrook*, xli. 132.

22. To avoid a contract, for misrepresentation, it must appear, that a deception was intended, that it was successful, and that it was a damage to the party deceived. *Pratt v. Philbrook*, xxxiii. 17. *Pratt v. Philbrook*, xli. 132.

23. Though a party may have been deceived by fraudulent representations, it is not usual for courts to interfere in his behalf, if he had full means of ascertaining the truth and detecting the fraud, and yet neglected to do so. *Pratt v. Philbrook*, xxxiii. 17. *Pratt v. Philbrook*, xli. 132.

24. An agreement, by the principal, made after having paid his note, that it should rest, for his benefit, in the hands of a third person, in order that the principal might thereby coerce the surety to relinquish some right in another matter, was without consideration and void. *Andrews v. Andrews*, xxxiii. 178.

25. A promise made to the principal by the surety, after such payment,

that, for the sake of having it canceled, he would relinquish his right in the other matter, and that the note might lie in the hands of such third person, for the benefit of the principal, could impart no validity to the note. *Andrews v. Andrews*, xxxiii. 178.

26. A parol agreement, made by the grantee at the time of the sale and conveyance of land, to pay a sum additional to that expressed in the deed, is valid, though such additional sum rests in contingency. *Nickerson v. Saunders*, xxxvi. 413.

27. A contract between an attorney and the plaintiff, that if the latter would permit the former to commence a suit in his name, and the action failed, he would pay all costs, is illegal. *Low v. Hutchinson*, xxxvii. 196.

28. A written contract, by the owner of a quantity of hay, with the tenant of a farm, that he may use the hay, the same to remain the property of the original owner, and the manure made therefrom to be and remain also his property as it is made, is lawful and valid. *Moore v. Holland*, xxxix. 307.

29. A contract to sell, and a delivery of, a quantity of boards, sufficient to make a certain number of sugar box shooks, is legal, though no survey was ever made. *Rogers v. Humphrey*, xxxix. 382.

30. The absence of previous or contemporaneous assent to a transaction, renders its ultimate validity contingent; and a subsequent assent does not relate back, to the prejudice of a party whose conduct has been guided by the actual transaction; especially, if, when the act was first communicated, he disaffirmed it. *Fiske v. Holmes*, xli. 441.

See ATTORNEYS, &c., 7, 14.

CONTRACT, 2, 12.

### III. CONSIDERATION.

(a) IN GENERAL.

(b) WANT OR FAILURE OF CONSIDERATION.

(a) *In general.*

31. A parol contract to discharge one of two joint debtors, if made without consideration, cannot be enforced. *Chase v. Vaughan*, xxx. 412.

32. A written agreement by a debtor, that, in consideration of his indebtedness, he will let his creditor have certain specified articles, at a time and place specified, at the market price, evidences a sufficient consideration, and imposes on the debtor the duty to set out the articles for the creditor at the time and place assigned. *Bates v. Churchill*, xxxii. 31.

33. An agreement by a creditor to discharge a debt, upon receiving a less sum than is due to him, is no consideration for the agreement to relinquish the balance. *Lee v. Oppenheimer*, xxxii. 253.

34. The right of holding shares, and the privileges of a stockholder, are a sufficient consideration for a promise to the corporation to take such shares and pay for them. *K. & P. R. R. Co. v. Jarvis*, xxxiv. 360.

35. The inconvenience to a debtor of procuring security for a part of the debt, is a sufficient consideration to support a promise by the creditor, to relinquish the residue. *Little v. Hobbs*, xxxiv. 357.

36. The sealing of a contract implies and carries with it internal evidence of a consideration. *Wing v. Chase*, xxxv. 260. *Augusta Bank v. Hamblet*, xxxv. 491. *Neil v. Tenney*, xlii. 322.

37. Labor performed under a contract made with a minority of a committee of a town, but afterwards ratified by a majority acting within the scope of their authority, though performed prior to the ratification, and though it was of no value to the town, is a sufficient consideration on which to maintain a suit against the town upon the contract. *Hanson v. Dexter*, xxxvi. 516.

See BANKRUPTCY, 13, 14.

(b) *Want or failure of consideration.*

38. At common law, the payment of a part only of a sum due, at the time and place of payment on a promise to cancel the whole claim, discharges the indebtedness to the amount of the sum paid and nothing more, there being no valid consideration for the promise to discharge. But the least consideration in such a case is sufficient. *Hinckley v. Arey*, xxvii. 362. *White v. Jordan*, xxvii. 370. *Lee v. Oppenheimer*, xxxii. 253.

39. Thus, where the defendant contemplated taking the benefit of the bankrupt Act, which was then in force, of which the plaintiff was informed, and thereupon accepted the terms of composition offered, and the defendant took no further steps to obtain relief under the bankrupt Act, it was held sufficient. *Hinckley v. Arey*, xxvii. 362.

40. So where the acknowledgment of satisfaction is by deed; or any other articles than money; or the note of a third person for a smaller sum than the amount of the debt; or a less sum than is due, before the day of payment, or paid at another place than that limited by the contract are accepted by the creditor in full satisfaction of the debt. *Lee v. Oppenheimer*, xxxii. 253.

41. So the inconvenience to a debtor of procuring security for a part of the debt, is sufficient. *Little v. Hobbs*, xxxiv. 357.

#### IV. RESCISSION.

42. Where a purchase has been made of a commodity, to be received at a future day, at a fixed price payable at a specified time, the seller may rescind the contract, after a failure by the purchaser to pay the full purchase money, at the stipulated time. *Dwinel v. Howard*, xxx. 258.

43. And if the purchaser receives a part of the commodity, and pays to the seller a greater sum than that part, at the agreed rates, would amount to; yet, if he fail to pay the residue, at the stipulated time, the seller may rescind the contract as to the residue, and without liability to pay back any part of the amount which he had received. *Dwinel v. Howard*, xxx. 258.

44. It is a general rule, that where there is a special contract, it must be observed, and a party cannot resort to an implied one. But fraud and imposition constitute an exception; and the party defrauded has a right to rescind the special contract, and he is then remitted to the implied one. *Jenks v. Matthews*, xxxi. 318.

45. Ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties. *Jenks v. Matthews*, xxxi. 318.

46. An agreement under seal to withdraw an action from the Court, is not rescindable by one of the parties alone. *Hutchings v. Buck*, xxxii. 277.

47. A contract for the sale and purchase of property, though founded upon

the misrepresentations of the seller, cannot be wholly rescinded therefor, if, prior to the completion of the sale, the purchaser had become acquainted with the whole facts, and yet confirmed the bargain. *Pratt v. Philbrook*, xxxiii. 17. *Pratt v. Philbrook*, xli. 132.

48. Where a party to a contract, obtained by fraud, would rescind it, he must restore whatever he has obtained by it, within a reasonable time. *Tisdale v. Buckmore*, xxxiii. 461. *Herrin v. Libbey*, xxxvi. 350. *Cushing v. Wyman*, xxxviii. 589. *Emerson v. McNamara*, xli. 565.

49. A contract, obtained through false and fraudulent representations, may be rescinded or affirmed at the election of the party defrauded. *Herrin v. Libbey*, xxxvi. 350. *Emerson v. McNamara*, xli. 565.

50. Such party, in order to rescind a contract, must make known his election to rescind and restore the other party to his former condition, (unless payment was made by the note of the vendee,) in a reasonable time after discovering the fraud. *Herrin v. Libbey*, xxxvi. 350. *Cushing v. Wyman*, xxxviii. 589. *Emerson v. McNamara*, xli. 565.

51. A contract for the sale and purchase of property, obtained by the concealment of material facts, going to the essence of the contract, and affecting the whole bargain, will be rescinded, whether such concealment was the result of forgetfulness or intention. *Pratt v. Philbrook*, xli. 132.

52. Although the party who seeks to rescind such contract, may have confirmed it after a knowledge of some of the facts, yet, if sufficient facts were unknown to him, at the time of confirmation, to authorize a rescission, such confirmation cannot effectually prevent it. *Pratt v. Philbrook*, xli. 132.

See FRAUD, 36, 37, 38.

## V. WAIVER, MERGER OR DISCHARGE.

53. In an action for a breach of promise of marriage, the fact that the female plaintiff had committed fornication with other men is no defence, if, at the time of making the contract, the defendant had knowledge of the misconduct; nor if such contract, made before, but continued by him as a subsisting contract after he had knowledge of it. *Snowman v. Wardwell*, xxxii. 275.

54. A contract, made by a citizen of Massachusetts with a citizen of this State to pay a sum of money, is not discharged by proceedings under the insolvent Act of that State. *Palmer v. Goodwin*, xxxii. 535.

54. The violation of a contract by a party to it, which will discharge another party, must consist of some omission of an act required, or commission of one forbidden, by it and essential to the continued performance of the contract. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

55. But a declaration that a party will not do a future act, which it has not and may not become his duty to perform; or a mere denial, that upon a future contingency, the other party shall not have any benefit from the contract, is not such a violation of it as will destroy its efficacy, without the assent of the other. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

56. There can be no recovery under a contract for labor, when not rendered in conformity to it, unless there has been some acceptance of it, or unless an exact performance has been waived, or unless the non-conformity was occasioned by the contractee. *Andrews v. Portland*, xxxv. 475.



57. A payment in part of the contract price for having done a job of work, is not a waiver of an exact performance of the contract, if, when making such payment, the party did not know that there was an insufficiency in the work. *Andrews v. Portland*, xxxv. 475.

58. Upon the erection of a building under a special contract, the contractor, though he may have departed from the contract as to the size of the building and quality of the work, yet if the building have been accepted, is entitled to recover for the labor and materials at the contract price, deducting so much as they are worth less on account of the departures. *White v. Oliver*, xxxvi. 92.

59. A waiver of the conditions, in a poor debtor's bond, by the obligee, before the time appointed for a disclosure, is effectual without a consideration. *Burrill v. Saunders*, xxxvi. 409.

60. By § 20, of c. 66, of R. S. of 1841, any person selling and delivering any boards, plank, timber or slitwork, before they are surveyed, shall forfeit two dollars per thousand. Yet, where the defendant contracted with the plaintiff for a quantity of joists, and received them without objection at his own survey, he is bound to pay the price agreed upon, although they were not surveyed by any sworn surveyor. *Abbott v. Goodwin*, xxxvii. 203.

## VI. PERFORMANCE AND BREACH.

(a) WHAT WILL EXCUSE PERFORMANCE.

(b) WHAT WILL CONSTITUTE A PERFORMANCE OR BREACH OF A CONTRACT.

(a) *What will excuse performance.*

61. In an action by a female for a breach of promise of marriage, the fact that she had committed fornication with other men, is no defence, if, at the time of making the contract, the defendant had knowledge of the misconduct. *Snowman v. Wardwell*, xxxii. 275.

62. Where, from the prevalence of a fatal disease, in the vicinity of the place where one had contracted to labor for a specified time, the danger was such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is sufficient cause for non-fulfilling the contract. *Lakeman v. Pollard*, xliii. 463.

63. If a party was prevented by sickness, or similar inability, to perform a contract, he may recover on a *quantum meruit* for what he did. *Lakeman v. Pollard*, xliii. 463.

See ACTION, 26.

LEASE, 8.

(b) *What will constitute a performance or breach of a contract.*

64. Acts, intended for a performance, if they involve a violation of law, are void. *Jones v. Knowles*, xxx. 402.

65. Hence to discharge a note for merchantable boards and clapboards, the articles set out and tendered must be of such quality and condition, as, under the statute, might lawfully be "offered" or "exposed for sale," or "delivered on sale." *Jones v. Knowles*, xxx. 402.

66. Plaintiff held a lien contract for the delivery of lumber, which contract

he assigned to A., to secure him for signing an accommodation note of \$1000, which the plaintiff negotiated and sold. The assignment authorized A. to use the contract for making the money to pay the note, if he, the plaintiff, should not supply the funds. Afterwards, the defendant purchased the plaintiff's remaining rights in the contract, subject to that lien; and indorsed upon the contract, an agreement, that from the proceeds of the lumber, then in A.'s hands, the amount of the note should be deducted, for its payment; and for that purpose the defendant supplied some funds to A. which A. paid to the holder. A. afterwards failed; and the defendant paid to his assignees the balance of the note, but they did not appropriate it to the payment of the note; and the plaintiff was obliged, as indorser, to pay that balance, for which this suit is brought:—*Held*, that the defendant, by furnishing the funds to A.'s assignees, had fulfilled his contract, and was not bound to see to the appropriation of the money. *Jenness v. True*, xxx. 438.

67. The treasurer of a corporation, having obtained permission to borrow the funds in his hands, upon giving his note with a mortgage, is not exonerated from liability as treasurer for the amount by the giving of his note without the mortgage. *Bluehill Acad. v. Ellis*, xxxii. 260.

68. In a contract dated November 25, 1848, conditioned to pay a sum of money to the plaintiff, if, at the expiration of one year from the date of a deed from defendants to plaintiff, dated Nov. 6, but acknowledged Nov. 25, 1848, the plaintiff should prefer to re-convey and shall offer to do so, a tender of a deed to one of the defendants, on the 26th day of Nov. 1849, is a full and seasonable performance. *Oatman v. Walker*, xxxiii. 67.

69. A joint covenant by two or more persons, that they will not do a specified act, which it was lawful for either of them to do alone, is broken whenever the act is done by either of them. *Wing v. Chase*, xxxv. 260.

70. An obligation to draw logs, into a stream, is complied with, by drawing into the stream, without regard to the question whether they could not be run, as the stream then was, the obligor not being required to inform himself from what points in the stream timber could not be run. *Palmer v. Fogg*, xxxv. 368.

71. A dentist is required to use a reasonable degree of care and skill in the manufacture and fitting of artificial teeth. The exercise of the highest perfection to which the art, at the time, had advanced, is not implied in his professional contract. *Simonds v. Henry*, xxxix. 155.

72. The defendant agreed to purchase lumber at a certain price per M., and pay the freight; when it was delivered, he refused to pay the freight, and the plaintiffs told him, that if he took it, he should pay \$40, per M., unless he paid the freight:—*Held*, that the defendant repudiated the contract, and, by keeping the lumber, was chargeable at the price fixed. *Patten v. Hood*, xl. 457.

## VII. CONSTRUCTION.

- (a) DEPENDENT AND INDEPENDENT STIPULATIONS.
- (b) PARTICULAR AGREEMENTS.
- (c) IN GENERAL.

### (a) *Dependent and independent stipulations.*

73. An agreement to give up a demand against a corporate company, in case the property of the company "is redeemed of the mortgagee, the refusal

of which is given till the first of January next," is no bar to the demand, if the property be not redeemed until after said day. *HOWARD, J.*, dissenting. *Patterson v. A. W. P. Co.*, xxx. 91.

74. One who furnishes mourning apparel, believing the estate of the deceased to be liable for it, and expressly stipulating that he would resort only to the estate for his pay, cannot maintain an action therefor against any of the family upon an implied promise. *Jenks v. Matthews*, xxxi. 318.

75. In a conditional agreement, if there be a failure to perform by one of the parties, the other may retract. And such condition may be implied from the nature of the transaction. *Dodge v. Greeley*, xxxi. 343.

76. Thus, a writ from the D. C. having been issued on a note of more than twenty dollars, the plaintiff received, and indorsed, a sum which would reduce the debt to less than twenty dollars, upon a condition that the balance should be paid before the return day of the writ, but such balance was not paid: — *Held*, the plaintiff might lawfully erase the indorsement. *Dodge v. Greeley*, xxxi. 343.

77. In a contract of service, at stipulated wages, for a specified time, "if the parties can agree," either party may terminate it at pleasure, and without showing any reasonable cause. *Durgin v. Baker*, xxxii. 273.

78. A written agreement, made by the payee when taking a promissory note, that the amount of an account previously due from him to the maker, "shall go to reduce the note," is executory, and does not convert the account into a payment upon the note. And, if, upon the bankruptcy of the maker, such account be sold by his assignee and paid to the purchaser by the payee, the agreement will not preclude the payee from recovering the whole amount of the note against the maker. *Merrill v. Moury*, xxxiii. 455.

79. There are cases in which the time agreed upon for the payment of money, is not of the essence of the contract, and, in such cases, the party aggrieved may obtain redress by process in equity. *Hill v. Fisher*, xxxiv. 143.

80. Where the plaintiff stipulated in writing, that he would discharge the debt against the defendant "upon payment of fifty per cent. of its amount, in four quarter-yearly payments, satisfactory security to be given, the first of said payments to be made May 1, 1850:" — *Held*, —

1st. That no time being stipulated within which to furnish such security, it is to be done in a reasonable time: —

2d. That a tender of such security, though seasonable, is not sufficient: —

3d. But that a neglect to *pay* the installment at the pay-day absolves the creditor from his promise. *Little v. Hobbs*, xxxiv. 357.

81. A policy, issued by a mutual insurance company, and a premium note, given at the same time for the payment of assessments, are independent contracts. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

82. When mutual contracts are independent, the neglect of one party to perform will not absolve the other. A contract made by an insurance company with one of its members, is equally binding as if made with a stranger. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

83. Bonds given between the parties, both being a part of the same transaction, the one to sell and the other to purchase land at a stipulated price, are not dependent, if they fix the time and place at which the purchaser is to make the payment. *Augusta Bank v. Hamblet*, xxxv. 491. *Allard v. Bel-fast*, xl. 369.

84. The plaintiff gave defendants a bond, in which was recited a contract, wherein plaintiff agreed to keep amended and repaired, agreeably to c. 25, R. S. of 1841, certain roads, &c., as laid out on a plan in the city of Belfast, for the term of four years, together with all new highways which, within the time, might be built by defendants, at and for the sum of \$2250, per year, payable in equal quarterly payments; and that if the plaintiff should perform said contract according to the statute, for the time specified, and to the acceptance of the road commissioners for the time being, and should save the defendants harmless from all claims for damages and costs arising from any obstruction or want of repair of any of the roads or bridges therein, then the bond to be void; otherwise, to remain in full force. The bond further provided, that if the plaintiff should, at any time, fail to perform his contract to the satisfaction, approval and acceptance of the commissioners, it should be in their power and at their option to put an end to said contract by giving plaintiff written notice of their decision, and allowing him *pro rata* pay, as above, to the time of said notice, and saving to defendants all rights and remedies by virtue of the condition of the bond:—

The commissioners would not approve of the plaintiff's alleged performance of his contract for one year of its continuance, and defendants refused to pay him for that time. In an action to recover for such quarterly payments, and for extra repairs on new roads, not properly completed:—*Held*,—

1st. That the mutual stipulations in this contract were independent:—

2d. That for any failure of plaintiff to comply with his contract, the defendants' remedy was upon his bond:—and,—

3d. That the plaintiff was entitled to no extra allowance for new roads not properly constructed, if they had been accepted by the selectmen. *Allard v. Belfast*, XL. 369.

85. A. contracted to sell B. all the logs cut and hauled, during a lumbering season, into a certain stream, by A.'s agents, at a stipulated price per M., based upon the scale of G., whose certificate of quantity was to be conclusive; with a further provision, that B. was to pay A. fifty cents per M. for driving the logs to a point named:—*Held*, that A. sold the logs when they were landed; and the agreement to drive was an independent branch of the contract; and that A. could not recover for, without proof of, the driving; but that he could recover for the value of the logs if not driven to the point named.—*Held*, also, that G.'s scale bill, annexed to his deposition and verified by oath, was evidence of the quantity of lumber. *Haynes v. Hayward*, XLI. 488.

#### (b) *Particular agreements.*

86. Where the plaintiff, "being about to set up a steam engine and planing machine, to be connected therewith, agreed with the defendant, being a house-carpenter, to take charge of and oversee the work, which was making drums, machinery and other gearing necessary to connect the same, and to receive one dollar and fifty cents per day for his services;" and where "it was proved, that he so worked there, overseeing the work and directing, until he pronounced the machinery to be in running order, and then left:—*Held*, that the defendant was not thereby bound, by a special agreement, to do the work in any manner; and that he was entitled to be paid for his own labor. *Haskell v. Sawyer*, XXVII. 234.

87. Where a conveyance of land is made, by an absolute deed, and the grantee gives back to the grantor a written contract, promising to sell the

land at a certain time, and pay two notes with the proceeds, and pay the balance to the grantor; such grantee holds the land in trust, and is bound to sell and appropriate as stated in his contract. *Pratt v. Thornton*, xxviii. 355.

88. To ascertain the true construction of a written contract, the situation of the parties, the acts to be performed under it, and the time, place and manner of performance, may be considered. The intention of the parties is to be ascertained by an examination of the instrument, and of its effect upon any proposed construction; and such a construction should be adopted as will carry that intention into effect, although a single clause, alone considered, would lead to a different construction. *Merrill v. Gore*, xxix. 346.

89. Thus, where the plaintiff agreed to procure for defendant a ship frame, "the timber to be of good quality and hewn to the moulds in a workmanlike manner," and to the acceptance of a master builder appointed by the defendants, and at the expense of the plaintiff, the defendants paying \$16 per ton, of 40 feet measured, to be surveyed by a sworn or competent surveyor; and the timber was accepted by the master builder, but a portion of it was condemned as refuse by the surveyor at the place of delivery:—*Held*, that if the master builder decided honestly upon the quality of the timber, his decision would be conclusive. *Merrill v. Gore*, xxix. 346.

90. A co-partnership was dissolved, with an agreement, that one of the members should assume and pay the company debts. A creditor, on being informed of the arrangement, by one of the firm, replied, that he was satisfied with it:—*Held*, that the reply did not discharge the other member of the firm. *Chase v. Vaughan*, xxx. 412.

91. Where one owed the plaintiff, upon a written contract, and a guaranty that he should perform was indorsed on it by the defendant, the law presumes the plaintiff to have been the party to whom the guaranty was made, though not named in it. *Jenness v. True*, xxx. 438.

92. The plaintiffs contracted to build certain sections of defendants' railroad, at agreed prices. While the work was progressing, defendants desired a suspension, with a view to some change in location. Thereupon, the contract was modified by the parties. For an agreed compensation, the work was to cease, till the further order of the defendants; and, if the work should be resumed within two years, defendants were to pay plaintiffs \$750; if resumed within that time, the former contract was to apply to a residue part only of said sections; and, upon such resumption, the plaintiffs, upon notice, were to proceed with the work upon said residue sections, in the manner and at rates of price originally agreed. In the modified contract, a quantity of stones for the road, which plaintiffs had procured, were purchased by defendants, upon a stipulation, that if such a resumption should take place, the stones should be re-purchased by plaintiffs.

The location of some sections having been altered, defendants, within the two years, recommenced operating upon some of its unchanged sections, no notice of their intention having been given to the plaintiffs, but employed another company to do their work:—*Held*, that, as the work was resumed within the two years, plaintiffs could not recover the \$750; but that they were entitled to do the work when resumed, and to recover damages for not being called upon and employed to do it. *Fowler v. K. & P. R. R. Co.*, xxxi. 197.

93. A transfer of corporation stock, made to fulfil a contract, is not ineffectual on account of its having been made two days earlier than the stipulated day. *Dodge v. Barnes*, xxxi. 290.

94. Defendant conveyed a dwellinghouse, which was partly finished, and gave an obligation to finish it. There was an erection, one and one-half story high, with rooms for the family. In the rear, and annexed to it, was an erection, one story high, designed for a kitchen. Annexed to that was another unfinished erection, designed for a wash room and other appendages:—*Held*, that this last erection was a part of the dwellinghouse, and that the obligation required the defendant to finish it for the uses originally designed, and in an appropriate workmanship. *Hovey v. Luce*, xxxi. 346.

95. Where, by written contract, the defendants were to pay, in addition to a certain amount for every M. feet of their timber “run through the plaintiff’s cut,” “one-half of all expenses incurred by said” plaintiff “in bringing up to said cut, from B., about fifty men to protect and guard said cut, and all expenses in connection therewith,” the wages and expenses of the men while returning, are within the contract. *Dwinel v. Barnard*, xxxii. 116.

96. If a grantor, after deeding his land, make a bill of sale of certain trees standing on the land to a third person, in pursuance of a verbal contract entered into before the deed, the vendee of the trees takes nothing by his purchase, although the grantee of the land knew of such contract before he took his deed. *Brown v. Dodge*, xxxii. 167.

97. B. verbally agreed to sell certain trees on his land to the defendant. C., knowing of that agreement, purchased the land of B. by deed. B. then gave defendant a bill of sale of the trees, pursuant to said agreement:—*Held*, that the agreement was verbal, unexecuted and without consideration. *Brown v. Dodge*, xxxii. 167.

98. Where a party has contracted with another to do a particular work, either at its cost or at a fixed price, a sub-contractor cannot resort to the principal for his compensation, but must look to his immediate employer. *Cleaves v. Stockwell*, xxxiii. 341.

99. Upon a verbal agreement between A., B. and C., that a note due from B. to A. shall be paid by C. at a future day, the promise of C. to pay accordingly, is but executory, and does not operate as payment. *Weeks v. Elliott*, xxxiii. 488.

100. Upon such an agreement, if the promise of C. be, that he will make the payment in services, (it being *in solido*,) it cannot be claimed, as against the holder, that any part of the note is paid by the performance of only a part of the services. *Weeks v. Elliott*, xxxiii. 488.

101. Where one has contracted to labor in the service of another during a given time, at a specified rate of wages, if he be discharged by his employer, before the expiration of the time, without justifiable cause, he is entitled to recover damages. *Miller v. Goddard*, xxxiv. 102.

102. But if he voluntarily quits the service before the expiration of the time, without justifiable cause, he can recover nothing for his previous labor. *Miller v. Goddard*, xxxiv. 102.

103. G. contracted to drive the defendants’ logs at a fixed price per M. feet. The plaintiff, however, was compelled to drive a large part of them with his own, in consequence of an intermixture with his; and, after the driving, he stipulated with the defendants, that they should not be required to pay him, for driving, more than \$200 in addition to the price which G. was to have had: *Held*, that this stipulation did not bind the plaintiff to perform all the duties in driving, which G. had agreed to perform. *Dow v. Huckins*, xxxiv. 110.

104. One, contracting to pay money, upon receiving a payment to himself

from a third person, does not defeat or diminish his liability by a surrender of his authority to receive such payment to himself. *Read v. Davis*, xxxv. 379.

105. His liability, however, is at an end, if, by means of the insolvency of such third person, or for any other cause, the contractee could not be damaged by the surrender. *Read v. Davis*, xxxv. 379.

106. Where one person engages to support another without designating any place where such support should be furnished, the election of the place is with the person to be supported. *Norton v. Webb*, xxxvi. 270.

107. But after this election is once made, he cannot revoke or change it. *Norton v. Webb*, xxxvi. 270.

108. A contract, signed by a party upon receiving the possession of personal property, and containing his promise to pay for the same; and also an agreement that the property shall remain the property of the other party till the payment should be made, is not a bailment, but a conditional sale. *Bryant v. Crosby*, xxxvi. 562.

109. If such contract, though not signed by the vendor, describe the property as "in good order and condition," such description is equivalent to a representation; and if he knew it to be untrue, would vacate the contract, but not otherwise. *Bryant v. Crosby*, xxxvi. 562.

110. Where a written agreement is entered into respecting a particular transaction, the parties to it are regarded as intending to secure to each other their entire rights. *Jeffrey v. Grant*, xxxvii. 236.

111. Thus, where a fisherman agreed in writing, that, for his services for the season, he should have his share of one half the fish, he is not entitled to any portion of the bounty. *Jeffrey v. Grant*, xxxvii. 236.

112. The statute of the U. S. allowing fishermen a share of the bounty, has no operation, when an agreement between them and the owners stipulates for a compensation without reference to it. *Jeffrey v. Grant*, xxxvii. 236.

113. The fact that one contract is recited as the occasion for making another to enable a party to perform it, does not make a party to the latter a party to the former. He could not become so without the consent of all the parties to it. *Bridges v. Stickney*, xxxviii. 361.

114. Nor can any such recital make him a party to it in any sense, or to any person further than he, by his own contract, engages to perform, or to aid another in the performance of the prior contract. *Bridges v. Stickney*, xxxviii. 361.

115. One who takes an assignment of a contract between other parties as security, can only be held responsible for its loss, by reason of some neglect of duty or misconduct respecting it. *Bridges v. Stickney*, xxxviii. 361.

116. Where, in consideration of a sum advanced to defendant, he agreed to go to California, and give the plaintiff one half of the "proceeds of his labor" there, for one year, no deductions are to be made from such proceeds, by reason of expenses paid for sickness during the year. *Staples v. Wheeler*, xxxviii. 372.

117. Although the name of one of the parties is omitted in that part of the contract describing the persons composing the party of the first part; yet if it appears that the one so omitted made a part of the advancement, and signed the contract before it was signed by the other party, he became a party to it, *de facto* and *de jure*. *Staples v. Wheeler*, xxxviii. 372.

118. Where the plaintiff contracted to labor for another for a stipulated

time and at stipulated wages, and, before his time expired, was rightfully discharged on account of his bad conduct, he is entitled to recover the value of his services, not exceeding the contract price. *Lawrence v. Gullifer*, xxxviii. 532.

119. And in such case, he will not be liable for any damages the other party may suffer, unless the laborer has intentionally and wilfully conducted in such a manner as to render it necessary that he should be discharged. *Lawrence v. Gullifer*, xxxviii. 532.

120. Where a railroad company agreed to pay a contractor 90 per cent. monthly, of the estimated amount of work done and materials procured in the construction of their road, under the report of their engineer, and another clause in the contract authorized the engineer to declare the contract abandoned, any sum due the contractor to be forfeited to the company, whenever he should find that the covenants of the contractor were not performed:—*Held*, that where the engineer had put an end to such contract, it did not operate to discharge the company from the payment of the 90 per cent. found to be due from them, prior to such determination. *Ricker v. Fairbanks*, xl. 43.

121. A distinction between “masts” and “logs” is recognized by the laws of this State; but under some circumstances the latter term may include the former. *Haynes v. Hayward*, xl. 145.

122. Where a contract in writing is made to sell certain “logs,” and the scale of a designated surveyor is agreed upon as the basis of the settlement between the parties, the “logs” described in the scale-bill are the only articles sold, notwithstanding the surveyor enumerates a “mast” as scaled in the same bill. *Haynes v. Hayward*, xl. 145.

123. A. purchased a lot of demands of B., and gave his notes therefor, with an agreement, on his part, to use all proper exertions to collect them without cost to B.; A. being at liberty to return the demands, with an account at the end of two years to B., who was to repay to A. the balance of purchase money not collected:—*Held*, that the recovery of such balance by A. did not depend upon his using proper exertions in collecting the demands; and that in such a transaction, there was a perpetual trust reposed in A., which could not be executed after his death by his representative. *Otis v. Adams*, xli. 258.

124. A. contracted with B., to deliver him, at a time and place specified, certain mill machinery, a part of which is iron castings, and which, it was agreed by the parties, should be made by D.:—*Held*, that A., having contracted to deliver them, would be responsible for the non-delivery of them, although prevented from so doing by D’s failure to have them ready. *Freeman v. Morey*, xli. 588.

125. A. offered to sell his interest in a vessel to B., for a given price. B. accepted the proposition, took possession of the vessel, loaded and sent her on a voyage. Two days out she was lost. B. had received no bill of sale of her, and the terms of payment had not been definitely agreed upon:—*Held*, that A. might recover the agreed price. *APPLETON, J.*, dissenting. *Rice v. McLarren*, xlii. 157.

126. Where the price of land in question was to be determined by arbitrators, and the plaintiffs agreed to release their claim to the same, and the defendant was to pay therefor the sum fixed as the value of the land, the release to the defendant, and the payment therefor, are to be concurrent acts. *Portland v. Brown*, xliii. 223.



127. To entitle the plaintiffs to recover in such case, they must aver and prove an offer to release, upon payment by the defendant. *Portland v. Brown*, XLIII. 223.

(c) *In general.*

128. Where A., an inhabitant of this State, performed labor in New Brunswick, for B., who was an inhabitant of that Province, and C., who was an inhabitant of that Province also, received means from B. for the purpose of paying the claims of A. and others; his undertaking is to be performed in that Province. *Very v. McHenry*, XXIX. 206.

129. Where contracts are made and to be performed in a foreign country, their legal effect must be determined according to the laws of that country. *Maguire v. Pingree*, XXX. 508.

130. If one part of a commercial contract, upon a literal construction, be found at variance with another part, the part which contributes more essentially to the contract and becomes the more material, will be entitled to more consideration than the part which is less so. *Smith v. Davenport*, XXXIV. 520.

131. An authority, given by the vote of a corporation to sell and convey its real estate, may be reasonably construed to include a right to make a binding contract to convey at a future day. *Augusta Bank v. Hamblet*, XXXV. 491.

132. After an award, that one of the parties shall convey to the other real estate, and judgment be rendered by an acceptance of such an award, both parties continue to claim the land, whereupon the land was sold, and its avails lodged with a depository, and the parties agreed, in writing, that the title should be litigated in an assumpsit suit between themselves; the defendant consenting to have the money considered as if in his hands: — *Held*, that the agreement did not preclude the defendant from relying upon the former judgment: — and that a decision, giving effect to that judgment, as a bar to the suit, is a decision upon the “merits” of the case. *Buck v. Spofford*, XXXV. 526.

133. A written contract is to be construed, and the meaning of the parties ascertained, from an examination of all its parts. If some part appear at variance with another, it must receive such a construction that the whole may operate harmoniously together. *Metcalf v. Taylor*, XXXVI. 28. *Chapman v. Seccomb*, XXXVI. 102. *Ricker v. Fairbanks*, XL. 43. *Portland v. Brown*, XLIII. 223.

134. Where the parties to a suit pending in court, agree in writing to refer it, with stipulations that it shall be withdrawn, each to pay his own cost; if one of the referees declines to act, the agreement becomes inoperative, and the action may stand for trial. *Chapman v. Seccomb*, XXXVI. 102.

135. A creditor brought two separate suits against different persons, in one of which he summoned trustees. He then proposed in writing to another creditor of the same defendants, that he would discharge his said claims, upon receiving, *inter alia*, “an obligation from the adverse parties to forbear any suit or trouble to him on account of his proceedings against them:” — *Held*, that an instrument, signed by the defendant in one of said suits, containing, first, a formal receipt in full of all demands, and secondly, an agreement, that “neither party” should be entered in a suit against the other defendant and

trustees, does not constitute the obligation contemplated in the plaintiffs' written proposal. *Dennison v. Benner*, xxxvi. 227.

136. Where the contents of a written contract, which is lost, is proved by parol, without any copy, its construction must be determined by the jury. *Moore v. Holland*, xxxix. 307.

137. The difficulty of ascertaining the construction of a contract is no reason for making it nugatory. Such a consequence is to be avoided if possible. *Rice v. McLarren*, xlii. 157.

138. No word in a contract is to be treated as a redundancy, if any meaning, reasonable and consistent with other parts, can be given it. *Heywood v. Heywood*, xlii. 229.

139. When the sum in dollars and cents is expressed in a contract, to be paid by one to the other, it is not to be rejected for a more uncertain standard. *Heywood v. Heywood*, xlii. 229.

140. A. agreed to pay B. forty dollars a year, rent, for a farm, the payment to be made in specific articles, at prices and in quantities specified, with the balance in cash, or country produce at cash price:—*Held*, that if A. failed to deliver them as agreed, B. cannot recover them, but must take the forty dollars. *Rice, J.*, dissenting. *Heywood v. Heywood*, xlii. 229.

141. Where no time of payment is stated in a contract, it must be paid within a reasonable time; but money payable in a reasonable time cannot be divided, at the election of the party paying, so as to make it payable at different times and in different sums. *O'Donnell v. Leeman*, xliii. 158.

See ASSIGNMENT, 34, 35.

PAYMENT, 24.

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## CONTRIBUTION.

1. One joint maker of a promissory note can maintain no action for contribution, unless he has paid upon the note more than the defendant has; even though there are other joint makers, who are insolvent. *Powers v. Gowen*, xxxii. 381.

2. A. and B. gave a joint and several note, which A. paid at maturity, B. having deceased:—*Held*, that the note, having been paid by A., and being in his possession, was evidence of his claim against the estate of his co-promisor for contribution. *Hardy v. Colby*, xlii. 381.

See ACTION, 46.

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## CONVERSION.

See TROVER.

## CONVEYANCE.

See DEED.

## CO-PARTNERSHIP.

See PARTNERSHIP.

## CORPORATION.

- I. HOW CREATED, ORGANIZED AND DISSOLVED.
- II. TRANSFER OF SHARES.
- III. CORPORATE POWERS, RIGHTS AND LIABILITIES.
- IV. RIGHTS AND LIABILITIES OF OFFICERS AND MEMBERS.
- V. PLEADINGS AND EVIDENCE.

## I. HOW CREATED, ORGANIZED AND DISSOLVED.

1. It is not necessary that the records of a corporation should exhibit a legal organization and acceptance of the Act of incorporation. The existence of the corporation may be inferred from the exercise of its corporate powers. *So. B. M. Dam Co. v. Gray*, xxx. 547. *Sampson v. B. S. M. Co.*, xxxvi. 78.

2. The dissolution of a corporation, by an Act of the Legislature, deprives it of its corporate existence. *Merrill v. Suffolk Bank*, xxxi. 57.

3. A corporation is not dissolved by ceasing to exercise its powers. Nor because its stockholders and directors may consider it to be defunct. *Rollins v. Clay*, xxxiii. 132.

4. Private corporations exist by legislative grants, conferring rights and powers for special purposes. *Yarmouth v. North Yarmouth*, xxxiv. 411.

5. A company, incorporated as trustees of a fund, with the power and duty of investing it and appropriating its income to the public schools of a town, is a private and not a public corporation. *Yarmouth v. North Yarmouth*, xxxiv. 411.

6. When, by a by-law, the officers of a corporation are to hold office for a year, and until others are chosen in their room, it seems unnecessary to insert in the warrant calling the annual meeting, "that officers are to be chosen;" although another by-law prescribes that such warrant shall "specify the business to be transacted." *Sampson v. B. S. M. Co.*, xxxvi. 78.

7. Where the prescribed officers are elected without such specification, and the corporation recognizes the existence and authority of such officers, by its acts, the election will be deemed valid. *Sampson v. B. S. M. Co.*, xxxvi. 78.

8. No legal organization by the corporators, under a charter granted by this State, can be effected by their action in another State. *Freeman v. Machias W. P. & Mill Co.*, xxxviii. 343.

## II. TRANSFER OF SHARES.

9. A transfer of corporation stock, made to fulfil a contract, is not ineffectual on account of its being made two days earlier than the stipulated day. *Dodge v. Barnes*, xxxi. 290.

10. Where the by-laws of a corporation required the transfer of stock to be made by the treasurer, and not by the owner, the treasurer thereby became the agent of the owner for that purpose. *Dodge v. Barnes*, xxxi. 290.

See CORPORATION, 64.

## III. CORPORATE POWERS, RIGHTS AND LIABILITIES.

11. All votes and proceedings of persons, professing to act in the capacity of corporators, when assembled beyond the bounds of the State granting the charter of the corporation, are wholly void. *Miller v. Ewer*, xxvii. 509.

12. A corporation, duly organized and acting within the limits of the State granting the charter, by a vote transmitted elsewhere, or by an agent duly constituted, may act and contract beyond the limits of the State. *Miller v. Ewer*, xxvii. 509.

13. Where the authority given to a corporation is to boom lumber and receive toll therefor, it is not entitled to demand toll for driving lumber. *Bangor B. Corp. v. Whiting*, xxix. 123.

14. Payments to a person, acting as agent for such corporation, made partly to pay for driving and partly for booming, are to be applied to each, according to the intent of the parties when the payments were made. *Bangor B. Corp. v. Whiting*, xxix. 123.

15. If the doings of an agent of a corporation are some of them within and some beyond the corporate powers, the corporation may ratify his acts so far as they were within its powers, but no further. *Bangor B. Corp. v. Whiting*, xxix. 123.

16. A corporation, authorized to hold real and personal estate, each to a limited amount, may lawfully make assessments upon its members to an amount exceeding the personal estate it was authorized to hold. *So. B. M. Dam Co. v. Gray*, xxx. 547.

17. Where a corporation, at its first meeting, voted the amount of each share in its stock, and that one of its members should solicit subscriptions, and the defendant subscribed for stock the same day, and there appeared to be no other subscription paper:—*Held*, that there was a proper authorization of the subscription. *So. B. M. Dam Co. v. Gray*, xxx. 547.

18. Although the share of a member may be liable to be sold by the company, for the non-payment of assessments due upon it, an action may be maintained where there is an express promise to pay. *So. B. M. Dam Co. v. Gray*, xxx. 547. *K. & P. R. R. Co. v. Kendall*, xxxi. 470.

19. Where a charter gave authority to erect dams, sluices and locks, at different places on a stream, and made provisions for compensating for land taken therefor, which dams, sluices and locks they proceeded to erect, and for the location of one of the dams, with its sluice and lock, they took a lease of the land and occupied under it for thirty-one years; (no compensation therefor, under the provisions of the charter, having been claimed or made,) it is to be considered, that the works upon the land leased, were erected in virtue of the right given by the charter, and not by the lease; and that, therefore, at the end of the leasehold, they belong to the company, with a right to be permanently maintained by them. *Ginn v. Hancock*, xxxi. 42.

20. The right, so acquired by the company, extends no further than to maintain their works, and give them the exclusive right of so much of the water as is necessary for the sluiceway. The residue of the water, belongs in equal parts, to the riparian proprietor on each side of the stream. *Ginn v. Hancock*, xxxi. 42.

21. Where a power has been given to corporations to collect their assessments on the shares, by a sale of the stock, an inference is not readily drawn, that the Legislature, without any express enactment to that effect, designed to create a personal liability on the share-holder. *K. & P. R. R. Co. v. Kendall*, xxxi. 470.

22. A statute authority "to make and collect such assessments on the shares," "as may be deemed expedient, in such manner as should be prescribed in their by-laws," does not confer, nor does any statute of the State confer, upon the corporation, the power to create a personal liability upon the stock-holder, to pay for his shares. *K. & P. R. R. Co. v. Kendall*, xxxi. 470.

23. Where, neither by contract nor by statute enactment, there is any personal obligation upon a stockholder to pay for his shares, such obligation cannot be created by any by-law or vote of the corporation. *K. & P. R. R. Co. v. Kendall*, xxxi. 470.

24. A by-law, providing that "if the shares of any such delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be liable to the corporation for any deficiency," will not sustain an action at law for such deficiency. *K. & P. R. R. Co. v. Kendall*, xxxi. 470.

25. A by-law of a corporation, though made in pursuance of an express power to make such laws, must be lawful and reasonable, in order to be valid. If contrary to the common or statute law, it is void. *K. & P. R. R. Co. v. Kendall*, xxxi. 470. *Jay Bridge v. Woodman*, xxxi. 573. *Came v. Brigham*, xxxix. 35.

26. Where the amount of stock is not fixed in the charter of a corporation, and the corporation has voted what the amount should be, it is not requisite in order to a valid assessment upon the shares of a number, that the whole of that amount should have been subscribed for, although his subscription was made after the vote was passed. *K. & P. R. R. Co. v. Jarvis*, xxxiv. 360.

27. The trustees of a school fund, holding the fund as a private corporation, for the use of schools, under a legislative contract, cannot be divested of it or of any part of it, by any legislative action. *Yarmouth v. North Yarmouth*, xxxiv. 411.

28. A statute, which should assume to distribute the fund between the schools of a town and those of another town, would be inoperative, although the latter town be created by a division of the former. *Yarmouth v. North Yarmouth*, xxxiv. 411.

29. An authority, given by the vote of a corporation, to sell and convey its real estate, may be reasonably construed to include a right to make a binding contract at a future day. *Augusta Bank v. Hamblet*, xxxv. 491.

30. The powers of a corporation are derived from the law and its charter. And no by-law of the corporation can enlarge its corporate powers. *Andrews v. Union M. F. Ins. Co.*, xxxvii. 256.

31. Where the charter only authorized insurance against fire, a by-law, referred to in the policy, recognizes damages by lightning as one of the risks

assumed, imposes no obligation upon the company to pay for losses other than by fire. *Andrews v. Union M. F. Ins. Co.*, xxxvii. 256.

32. By c. 91, § 14, R. S., 1841, "all deeds and contracts, executed by an authorized agent, for an individual or corporation, either in the name of the principal, by such agent, or in the name of such agent, for the principal, shall be considered the deed of such principal. *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

33. Where a corporation makes a contract through an agent, who puts to it a seal, it becomes, by law, the deed of the corporation, though it has not their common seal. *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

34. The by-laws of a corporation, not repugnant to the laws of the land, are obligatory upon all its members. And it may lawfully make and utter its promissory notes, in accordance with such by-laws. *Came v. Brigham*, xxxix. 35.

35. A judgment against a corporation, cannot be impeached for any defect in the service of the original process, by any party privy to it. To such it is valid until reversed. *Came v. Brigham*, xxxix. 35.

36. All creditors, whether so originally, or by indorsement or assignment, are within the beneficial provisions of c. 76, of R. S., 1841. *Came v. Brigham*, xxxix. 35.

37. An agent, lawfully authorized to "purchase stock and make sales for the corporation, to hire and discharge help, and manage the concerns of the corporation, being subject at all times to the direction of the board of directors," gives sufficiently extensive power to embrace all transactions necessary for the management of them in the usual manner. *Whitney v. South Paris M. Co.*, xxxix. 316.

38. And, in his dealings with others, his powers would not be restricted by his being subjected to the direction of the board of directors, unless they interposed to limit them. *Whitney v. South Paris M. Co.*, xxxix. 316.

39. An agent, with such authority, may waive demand and notice on a note indorsed by such company, even after the note has been negotiated, and to procure delay of payment, and, although in procuring delay, he may also act as agent of the maker. *Whitney v. South Paris M. Co.*, xxxix. 316.

40. Nor will the fact, that he agreed to pay more than the legal rate of interest for such delay, prevent a recovery against the company, of the amount legally due. *Whitney v. South Paris M. Co.*, xxxix. 316.

41. Where the charter requires the capital stock to consist of not less than a given number of shares, no assessments can be made upon subscriptions to such stock before the required number is taken; neither will the subscriptions be binding. *O. & L. R. R. Co. v. Veazie*, xxxix. 571. *P. & K. R. R. Co. v. Dunn*, xxxix. 587. *Penobscot R. R. Co. v. Dummer*, xl. 172.

42. A subscription for a certain portion of stock, on condition that a proposition made by the subscriber shall be accepted, which in fact was but the basis of a contract, but when drawn in form was repudiated by the subscriber as variant, is invalid, though accepted by the corporation. *O. & L. R. R. Co. v. Veazie*, xxxix. 571.

43. The alteration of the charter, requiring a less amount of capital stock, whereby the amount required is subscribed for, cannot make previous subscribers liable as share-holders, who were not such before the alteration. *O. & L. R. R. Co. v. Veazie*, xxxix. 471.

44. Thus, where the defendant subscribed for 1000 shares in the plaintiff

corporation, where the charter required 11,000 shares to be the minimum, and a less number were subscribed, when the company was organized, the subscriptions accepted and assessments made; and thereafterwards an Act reducing the minimum of the stock below the number subscribed, was accepted by the corporation:—*Held*,—

1st. That the minimum number of shares required by the charter, at the time the subscription was made, was a condition precedent to be fulfilled before the subscriptions can be collected or assessed.

2d. That the alteration and acceptance of the charter as amended, would not authorize the corporation to assess a subscription, made under the original charter.

3d. Nor will the defendant be estopped to set up the original conditions of his subscriptions, although he may have exhibited himself as share-holder and officer of the corporation, and had contributed towards payment of the expenses of the corporation. The requirements of the charter cannot be waived.

4th. That corporators cannot relieve the corporation from its obligation to possess the capital stock required by its charter, by any acts or declarations. *O. & L. R. R. Co. v. Veazie*, xxxix. 571.

45. Where one condition of subscription to stock was, that not more than five dollars on a share should be assessed at one time, and two or more were laid at the same time, but payment was not required upon but one at the same time, such assessments are binding. *P. & K. R. R. Co. v. Dunn*, xxxix. 587. *Penobscot R. R. Co. v. Dummer*, xl. 172.

46. Whether directors of a corporation have power to release a subscription to the capital stock, without consideration, *quere*? But, if they possessed that power, and the release be optional with the subscriber, he must elect within a reasonable time. *Pen. & Ken. R. R. Co. v. Dunn*, xxxix. 587.

47. A recognition and claim of representing such shares, long after such action of the directors, may well be considered an election to retain the shares subscribed for. *Pen. & Ken. R. R. Co. v. Dunn*, xxxix. 587.

48. Where the terms of subscription required, that seventy-five per cent. of the estimated cost of any sections of the railroad should be subscribed for by responsible persons, before commencing its construction, if the subscription is obtained in good faith, assessments will be valid, although some of the subscriptions, to make up that amount, should turn out to be worthless. *Penobscot R. R. Co. v. Dummer*, xl. 172.

49. Where, on failure of share-holders to pay the legal assessments upon them, the statute authorized a sale of the shares at auction, under an order from the directors to the treasurer, and a right to recover of the corporators the balance remaining unpaid, a sale, made by the treasurer under the authority of a committee appointed by the directors, is illegal. The directors cannot delegate their powers in such cases. *Y. & C. R. R. Co. v. Ritchie*, xl. 425.

50. Nor can such a sale be upheld under an order from the directors in the alternative. It must be absolute. *Y. & C. R. R. Co. v. Ritchie*, xl. 425.

51. As a general rule, corporations are not responsible for the unauthorized or unlawful acts of its officers. *Mitchell v. Rockland*, xli. 363.

52. Where the charter requires notice of the time and place for opening books of subscription to the capital stock to be given under the direction of the persons named in its first section, a majority of the persons thus named, may lawfully give such notice. *Penobscot R. R. Co. v. White*, xli. 512.

53. The right to make assessments cannot be made to depend upon any

actual indebtedness existing at the time, nor can it be defeated by any apparent indebtedness incurred under an invalid contract. *Penobscot R. R. Co. v. White*, **XLI.** 512.

54. In an action by a railroad corporation to recover assessments, made for the general and legitimate purposes of the corporation, the plaintiffs need not show a compliance with its charter requiring that the company shall not engage in, nor commence the construction of, any section or sections of the road, until seventy-five per cent. of the estimated cost thereof shall have been subscribed for by responsible persons. *Penobscot R. R. Co. v. White*, **XLI.** 512.

55. A corporation, empowered to make contracts in writing, are not thereby authorized to confer that power upon one of their officers to contract in their behalf. *Female O. Asylum v. Johnson*, **XLIII.** 180.

56. By special Act of 1841, c. 105, the Female Orphan Asylum of Portland, by their managers, were authorized to bind to service children under their control:—*Held*, that a contract, signed by defendant on his part, and M. B. S., “in behalf of the Female Orphan Asylum of Portland,” was not authorized by the Act. *Female O. Asylum v. Johnson*, **XLIII.** 180.

See CONTRACT, 8.  
PARISH.  
RAILROAD.

#### IV. RIGHTS AND LIABILITIES OF OFFICERS AND MEMBERS.

57. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the limits of the State granting the charter, are void. *Miller v. Ewer*, **XXVII.** 509.

58. In a suit under c. 76, of R. S. of 1841, by a creditor against a stockholder, the defendant cannot protect himself by proof that he has paid to the corporation, the whole amount to which the statute made him liable, (being 100 per cent. upon his stock,) towards the payment of the corporation debts. *Fowler v. Robinson*, **XXXI.** 189.

59. A corporation, being indebted to the amount of seventy-five per cent. of its stock, voted, that each stockholder should pay to the treasurer, that proportion, in order to discharge the debts. The plaintiff and defendant were both stockholders. Though many failed to make such payment, the defendant paid to the treasurer, 100 per cent. But, as the vote contained no stipulation that a stockholder, on making the payment, as voted, should be released from the claims of creditors:—*Held*, that the plaintiff, being a creditor of the corporation, was not barred by his concurring in the vote, from recovering against the defendant. *Fowler v. Robinson*, **XXXI.** 189.

60. A corporation cannot recover, in an action at law, for its shares or assessments upon them, unless the holder has made an express agreement to pay for them; or unless, by its charter or other statute provision, a personal obligation is imposed upon the holder, to make such payment. *K. & P. R. R. Co. v. Kendall*, **XXXI.** 470.

61. An agreement in writing to subscribe a specified number of shares to the stock of a corporation, is not an express promise to pay for them. *K. & P. R. R. Co. v. Kendall*, **XXXI.** 470.

62. The directors of a bank have authority, in behalf of the corporation,



to release a person whom they propose to call as a witness. *Lewis v. Eastern Bank*, xxxii. 90.

63. Directors of a corporation, unless specially empowered, have no authority to sell any portion of its estate, essentially necessary for the transaction of its customary business. *Rollins v. Clay*, xxxii. 132.

64. The by-laws of a corporation required that transfers of shares in its capital stock should be "noted and subscribed in a book, kept for the purpose:"—*Held*, that the sale of a stockholder's share would not exonerate him from individual liability upon corporation debts, contracted prior to the time of noting and subscribing the sale upon the transfer book. *Fowler v. Ludwig*, xxxiv. 455.

65. Under c. 76, § § 18, 19, and 20, R. S. of 1841, the obligation of a stockholder to pay corporation debts, is made to depend upon the officer's certificate upon the execution, that he could not find corporate property. *Grose v. Hilt*, xxxvi. 22.

66. Before the existence of such execution and certificate, payments made by a stockholder upon any debt of the corporation, though it might give him a claim against the corporation, will constitute no defence to a suit by a judgment creditor, upon whose execution the prescribed certificate has been made. *Grose v. Hilt*, xxxvi. 22.

67. The Act of 1851, c. 10, in relation to the liability of stockholders for corporation debts, was merely prospective. *Grose v. Hilt*, xxxvi. 22.

68. Where an organization of a corporation was attempted in another State, and shares under it were taken by plaintiff, which were afterwards sold by the corporation for non-payment of assessments; and subsequently an organization was completed in this State, and all the prior proceedings were confirmed:—*Held*, that if the plaintiff, by the new organization, became the lawful owner of the shares, by the same act he was deprived of them, and could maintain no action upon them for dividends. *Freeman v. M. W. P. & M. Co.*, xxxviii. 343.

69. The individual members of railroad corporations are subjected to the special liabilities imposed by c. 76, of R. S., of 1841, unless specially exempted therefrom by their charter. *Came v. Brigham*, xxxix. 35.

70. In an action against a stockholder, for the neglect of a corporation to pay a judgment against them, he cannot interpose the defence, that there was a variance in the original suit between the proof and declaration. It is enough that the record shows a good cause of action, and that no such objection was made by the corporation. *Came v. Brigham*, xxxix. 35. *Cole v. Butler*, xliii. 401.

71. The stockholders of a corporation, for an unsatisfied judgment against it, are liable to such judgment creditor, although he is an assignee of the debt against it. *Came v. Brigham*, xxxix. 35.

72. A subscription for a certain portion of the capital stock of a corporation, on condition that a proposition, made by the subscriber shall be accepted, which was in fact but the basis of a contract, but when drawn in form was repudiated by the subscriber as being variant from the proposition, is invalid, although the proposition may have been accepted by the corporation. *O. & L. R. R. Co. v. Veazie*, xxxix. 570.

73. An agreement to take and fill a given number of shares, in an incorporated company, is equivalent to a promise to take and pay for such shares. *Buckfield B. R. R. Co. v. Irish*, xxxix. 44. *Pen. & Ken. R. R. Co. v.*

*Dunn*, xxxix. 587. *Pen. R. R. Co. v. Dummer*, xl. 172. *Y. & C. R. R. Co. v. Pratt*, xl. 447.

74. When a corporation has proceeded regularly to ascertain its corporators and the owners of shares in its capital, and has entered them in its records, all parties become thereby *prima facie* entitled to the rights thus secured to them. *Pen. R. R. Co. v. Dummer*, xl. 172.

75. For the official misconduct of the directors of an incorporated company, and fraud in the discharge of their duties, they are responsible to the corporation. *Smith v. Poor*, xl. 415.

76. An individual corporator, who has suffered damage in a contract made with an incorporated company, through the fraudulent acts and votes of its directors, under color of their office, can maintain no action against them to recover compensation, his remedy being against the company. *Smith v. Poor*, xl. 415.

77. By c. 369, § 5, of special laws of 1846, delinquent subscribers or stockholders in the York & Cumberland R. R. Co., were made accountable for the balance, if their shares should sell for less than the assessments due thereon, with the interest and cost of sale. *Y. & C. R. R. Co. v. Pratt*, xl. 447.

78. The defendant subscribed for two shares in the stock of the plaintiff corporation, on certain conditions named therein, none of which had reference to the number of shares to be subscribed for, and paid three assessments thereon. Afterwards more assessments were made, their payment by him refused, and the shares were sold in accordance with the charter and by-laws, for a less sum than the amount assessed:—*Held*, that defendant was liable for the balance, although the minimum number of shares had not been subscribed. *Y. & C. R. R. Co. v. Pratt*, xl. 447.

79. Prior to the organization of a railroad corporation, the defendant, by his subscription, agreed to become holder of twenty-five shares in the capital stock, upon the condition, that not less than the least sum required by the charter should be subscribed:—*Held*, that it was not competent for a subscriber to show, that the shares subscribed for, and recorded in the books of the corporation, were subscribed for by persons of no actual pecuniary responsibility, and reputed not to be responsible for the amount subscribed for by them, with the qualification, however, that the defendant might introduce any testimony tending to show that the subscriptions were not made and accepted in good faith. *Penobscot R. R. Co. v. White*, xli. 512.

80. From the nature of the contract of subscription, it must be within the contemplation of the parties, that the share-holders, or corporators, should determine who were apparently responsible as subscribers; and, when they have done so in good faith, the subscribers to the stock must be regarded as bound by such decision. *Penobscot R. R. Co. v. White*, xli. 512.

81. The treasurer of a corporation, who purchases stock in its behalf, and by direction of its authorized officers, does not render himself personally liable to pay therefor; *aliter*, if he really acts for himself, or without authority from the corporation, though purporting to act as its agent and in its behalf. *Haynes v. Hunnewell*, xlii. 276.

82. The by-laws of a corporation, made in pursuance of its charter, are equally binding on all the members and others acquainted with their method of business, as any public law of the State. *Cummings v. Webster*, xliii. 192.

83. A corporation creditor, who first moves in conformity to law, acquires a priority of right to recover against a stockholder, under R. S. of 1841, c. 76, §§ 18, 19, and 20, with which no other creditor subsequently moving can interfere. Nor can the rights of the first be affected, although the second, by pursuing the shorter remedy, may fail to obtain satisfaction of his judgment. *Cole v. Butler*, XLIII. 401.

84. Any payment made to a subsequently moving creditor by such stockholder must be regarded as a payment in his own wrong. *Cole v. Butler*, XLIII. 401.

85. The stockholder is liable only for the amount of his stock without interest thereon. *Cole v. Butler*, XLIII. 401.

See AGENCY, 10, 11, 20.

CONTRACT, 10, 11.

## V. PLEADINGS AND EVIDENCE.

86. It is incumbent on one claiming title under a deed from a corporation, executed by one in the character of an agent, to prove that the corporation, by a legal vote, had authorized such person to make the conveyance. *Miller v. Ewer*, XXVII. 509.

87. Where a railroad passes over parts of two counties, the corporation may maintain an action in that county wherein they have an office which is "made the depository of the books and records of the company, by a vote of the directors, and a place where a large share of their business is transacted;" although the company may have, at the same time, another office in the other county, where the residue of their business is transacted, and in which the treasurer and clerk reside. *A. & K. R. R. Co. v. Stevens*, XXVIII. 434.

88. In a suit by a corporation, upon an account annexed for *driving* and *booming* lumber, (the charter only authorizing them to *boom* lumber,) it is rightful to allow the plaintiffs to amend by withdrawing the charge for the *driving*. *Bangor B. Corp. v. Whiting*, XXIX. 123.

89. An action may be maintained, in the courts of this State, against a corporation established by the Legislature of another State. R. S. of 1841, c. 76, § 31. *Williams v. N. E. Mut. Fire Ins. Co.*, XXIX. 465.

90. In such action, jurisdiction is conferred upon the Courts of this State, in behalf of a citizen of this State, by an attachment of defendant's property under our trustee process. *Williams v. N. E. Mut. Fire Ins. Co.*, XXIX. 465.

91. Where, by the charter of a foreign insurance company, claimants were to bring their suits in *that State*, in cases in which, after notice of loss, "the directors, upon view of the same, or in such manner as they may deem proper, shall ascertain and determine the amount of loss," &c.:—*Held*, that that provision does not preclude the courts of this State from holding jurisdiction of actions brought to recover for losses, in cases where no such determination was made by the company. *Williams v. N. E. Mut. Fire Ins. Co.*, XXIX. 465.

92. The plea of general issue, to an action by a corporation, admits only their power to sue and be sued. *Trustees of P. F. School v. Fisher*, XXX. 523. *Freeman v. M. W. P. & M. Co.*, XXXVIII. 343. *O. & L. R. R. Co. v. Veazie*, XXXIX. 571. *Pen. & K. R. R. Co. v. Dunn*, XXXIX. 587.

93. It is not necessary that the records of a corporation should exhibit a

legal organization and acceptance of the Act of incorporation. The existence of the corporation may be inferred from the exercise of its corporate powers. *So. Bay M. Dam Co. v. Gray*, xxx. 547. *Sampson v. B. S. M. Corp.*, xxxvi. 78.

94. It is not essential to the existence of a corporation, or to its right to maintain suits at law, that its clerk should have been sworn, or that he should have filed in the office of the register of deeds a certificate of his appointment. *So. Bay M. Dam Co. v. Gray*, xxx. 547. *Hudson v. Carman*, xli. 84.

95. Where there is nothing in the laws of the State, or in the by-laws of the corporation, to limit the continuance in office of its clerk, the one properly chosen remains in office until another is chosen. *So. Bay M. Dam Co. v. Gray*, xxx. 547.

96. Where, in a suit upon a contract relative to certain corporation stock, the contract, offered in evidence, disagreed with the declaration as to the plaintiff's christian name, and also as to the name of the corporation; but the identities were apparent from the recital in the contract, and from the corporation records, to which the contract referred:—*Held*, that the variances constituted no defence. *Dodge v. Barnes*, xxxi. 290.

97. Upon a subscription, promising a corporation to take and pay for shares in its stock, assumpsit may be maintained, although the corporation has not exercised its chartered authority to sell the shares for the delinquency of payment. *Ken. & P. R. R. Co. v. Jarvis*, xxxiv. 360.

98. The right acquired by holding shares, is a sufficient consideration for a promise to the corporation to take such shares and pay for them. *Ken. & P. R. R. Co. v. Jarvis*, xxxiv. 360.

99. The agreement to associate together under an Act to accomplish the purposes designed, would seem to be a sufficient consideration to sustain a suit by a corporation upon a subscription to stock. *Ken. & P. R. R. Co. v. Palmer*, xxxiv. 366.

100. In a suit by a corporation against a subscriber to its capital stock, to recover assessments, made upon the shares, it is not competent for the defendant to show, by parol evidence, that his subscription was upon a condition, not expressed in writing. *Ken. & P. R. R. Co. v. Waters*, xxxiv. 369.

101. The treasurer's certificate of a payment made by a stockholder towards corporation debts, is explainable by parol, especially to show the time of the payment, if in that respect the certificate be silent. *Grose v. Hilt*, xxxvi. 22.

102. In a suit against a stockholder liable for corporation debts, the judgment against him may include the cost of suit, in addition to the amount of his stock. *Grose v. Hilt*, xxxvi. 22.

103. The by-laws of a corporation authorized its directors to manage all its prudential concerns; and they certified, by a document signed by them in that capacity, that the plaintiff had previously advanced a specified sum for the corporation, which sum, with its interest, was still due to him:—*Held*, that upon such certificate, an action may be maintained. *Sampson v. B. S. M. Corp.*, xxxvi. 78.

104. Such certificate is to have full effect as the foundation of a suit, notwithstanding the existence of a by-law, prescribing that the directors shall hold stated meetings and keep a record of their votes and doings. *Sampson v. B. S. M. Corp.* xxxvi. 78.

105. Assumpsit cannot be maintained upon the contract of a corporation

made through an agent, who puts to it a seal, though it has not their common seal. *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

106. In an action against a stockholder, for the neglect of the corporation to pay a judgment against them, he cannot interpose the defence, that there was a variance in the original suit between the proof and declaration. It is enough that the record shows a good cause of action. *Came v. Brigham*, xxxix. 35. *Cole v. Butler*, xliii. 401.

107. The return of an officer, upon an execution, is sufficient evidence that he held it for the purpose of collection. *Came v. Brigham*, xxxix. 35.

108. When a subscription is made on condition, that a certain number of shares shall be subscribed for before the corporation shall be organized, the records of its proceedings showing that the required number had been taken, are competent and *prima facie* evidence that the condition has been performed. *Pen. & Ken. R. R. Co. v. Dunn*, xxxix. 587. *Pen. R. R. Co. v. Dummer*, xl. 172. *Pen. R. R. Co. v. White*, xli. 512.

109. And where a subscription is based on a further condition, that the company is not to enter into any contracts for the construction of its road, until a given number of shares are taken, the books of the directors, in the absence of countervailing evidence, are competent to show the fulfillment of the condition, if the directors had authority to act. *Pen. & Ken. R. R. Co. v. Dunn*, xxxix. 587.

110. And the corporation records are competent to show its incorporators, in the absence of countervailing evidence. *Pen. & Ken. R. R. Co. v. Dummer*, xl. 172. *Pen. R. R. Co. v. White*, xli. 512.

111. No other demand, for payment of assessments to maintain an action, is necessary, than that prescribed in the by-laws of the corporation. *Pen. & Ken. R. R. Co. v. Dummer*, xl. 172.

112. To maintain an action under a special statute authority, its terms must have been strictly complied with. *Y. & C. R. R. Co. v. Ritchie*, xl. 425.

113. The acceptance of a charter creating a company must be proved by the best evidence in the power of the party relying upon it. The records of a corporation are the regular evidence of its acts. *Hudson v. Carman*, xli. 84.

114. If its records cannot be produced, an acceptance of the charter may be proved by implication from the acts of the company. *Hudson v. Carman*, xli. 84.

115. In an action to recover from an individual stockholder the amount of a creditor's judgment against the corporation, the organization and existence of the corporation, if denied, must be proved. The judgment obtained is not conclusive evidence of these facts. *Hudson v. Carman*, xli. 84.

116. In an action by a railroad corporation to recover assessments, made for the general and legitimate purposes of the corporation, it is not necessary for the plaintiffs to show a compliance with the provision of its charter, requiring that the company shall not engage in, nor commence, the construction of any section of its road, until seventy-five per cent. of the estimated cost thereof shall have been subscribed for by responsible persons. *Pen. R. R. Co. v. White*, xli. 512.

117. Prior to the organization of the corporation, the defendant, by his subscription, agreed to become the holder of twenty-five shares in the capital stock, upon the condition, that not less than the least sum required by the

charter should be subscribed:—*Held*, that it was not competent for a subscriber to show, that the shares subscribed for and recorded, were subscribed for by persons of no actual pecuniary responsibility, and reputed not to be responsible for the amount subscribed for by them, with this qualification: that the defendant might introduce any testimony tending to show that the subscriptions were not made and accepted in good faith. *Pen. R. R. Co. v. White*, xli. 512.

118. The declarations of a subscriber, made, long after the organization, in relation to his subscription, are not admissible to show that the corporators did not act in good faith in receiving his subscription. *Pen. R. R. Co. v. White*, xli. 512.

119. It is immaterial with what motives, and under what circumstances, the defendant acted in signing a paper calling, and in attending, a meeting of the directors, at which certain assessments were made; and evidence offered upon these points is inadmissible. *Penobscot R. R. Co. v. White*, xli. 512.

See EVIDENCE, 275—279.

## COSTS.

- I. RECOVERY OF COSTS.
- II. COSTS IN PARTICULAR CASES.
- III. WHEN AFFECTED BY THE AMOUNT OF DAMAGES.
- IV. TAXATION OF COSTS.

### I. RECOVERY OF COSTS.

- (a) IN WHAT CASES A PARTY WILL, OR WILL NOT RECOVER COSTS.
- (b) WHO IS LIABLE FOR COSTS, AS PARTY TO THE SUIT.

(a) *In what cases a party will, or will not recover costs.*

1. A trustee, who does not disclose at the first term, is not entitled to cost arising at any subsequent stage of the case. *Warren v. Gibbs*, xxix. 464.

2. Where a defendant complains for costs, because the action against him has not been entered in Court, he is bound to prove that the writ was served upon him; otherwise, costs will be allowed against him, as a matter of course. *Hodge v. Swazey*, xxx. 162.

3. Where an action is entered at the proper term, and the defendant appears by his attorney, and enters his appearance upon the docket, the Court cannot take away the defendant's right to costs, by ordering a mis-entry, on motion of the plaintiff. *Whitney v. Brown*, xxx. 557.

4. When an action, brought into this Court by exceptions from the District Court, is dismissed because irregularly brought here, no costs are allowed, unless the case be such that the dismissal of it puts an end to the whole controversy. When an action, thus dismissed, is to go back to the District Court for further proceedings, neither party can claim costs. *Sweetser v. Kenney*, xxxi. 288. *Turner v. Putnam*, xxxi. 557.

5. Where, in assumpsit, an offer to be defaulted for a specified sum is made,

and not accepted, and, on trial, no larger sum is recovered, the defendant's cost, arising subsequent to the filing of the offer, will be allowed, and set off against the sum offered; and judgment will be for the plaintiff, for the balance, with his costs to the time when the offer was entered. *Stone v. Waitt*, xxxi. 409.

6. In a suit upon a note, or mortgage to secure it, if the plaintiff has received more than the legal rate of interest, and the consequent reduction of damages have been procured by proof introduced by the defendant, the plaintiff is *not*, but the defendant *is*, entitled to costs, by the Act of 1846, c. 192. *Larrabee v. Lumbert*, xxxii. 97.

7. In a suit upon a six months relief-bond, the defendants cannot recover costs, unless the condition of the bond has been performed, under Act of 1848. *Hathaway v. Stone*, xxxiii. 500. *Warren v. Davis*, xlii. 343.

8. An unqualified repeal of a penal statute, or Legislative Resolve, upon which a pending action was founded, extinguishes the suit; and no costs are recoverable by either party. *Saco v. Gurney*, xxxiv. 14. *Dudley v. Greene*, xxxv. 14.

9. When a creditor's demand is partly upon a lien claim, and partly upon a non-lien claim, he may maintain separate actions, with a recovery of costs in each, notwithstanding the general rule. *Bicknell v. Trickey*, xxxiv. 273.

10. The provision of R. S., of 1841, c. 115, § 56, giving costs to the prevailing party, applies in all cases, except when limited or restricted by some other statute. *Ellis v. Whittier*, xxxvii. 548. *Mudgett v. Emery*, xxxviii. 255.

11. And the costs in an action are controlled by the laws in force when the judgment is rendered, and not by those in force when the action was commenced. *Ellis v. Whittier*, xxxvii. 548. *Cole v. Sprowl*, xxxviii. 190.

12. In a real action, where, by brief statement, a portion of the demanded premises is disclaimed, and such part is accepted by the demandant in satisfaction of his claim, a judgment in his favor for costs is erroneous. *Mudgett v. Emery*, xxxviii. 255.

13. Under the provisions of R. S. of 1841, c. 125, § 16, when the respondent renders an account of the money due, and of the rents and profits in a reasonable time after demand, the complainant can recover no costs. *Kittredge v. McLaughlin*, xxxviii. 513.

14. And although the respondent has complied with the demand in rendering the account, yet, if he denies the right of the complainant to redeem when he is entitled to, he can recover no costs. *Kittredge v. McLaughlin*, xxxviii. 513.

15. Where an action is commenced upon a bond prescribed in § 6, c. 211, of Acts of 1851, and the selectmen of the town interested indorsed upon it their approval of the suit, no costs are recoverable by the defendants. *Saco v. Woodsum*, xxxix. 258.

16. In a suit against the principal and sureties in a poor debtor's bond, where a tender covers the *joint liability*, no costs can be recovered by plaintiff, though he is entitled to a separate judgment against the principal for twenty per cent. interest on the amount due, beyond the amount tendered. *Call v. Lothrop*, xxxix. 434.

17. Although the trial of an action before a magistrate is a nullity for want of jurisdiction, and on appeal the action is dismissed, the prevailing party is still entitled to costs. *Call v. Mitchell*, xxxix. 465.

18. In an action of replevin, where there is a judgment for a return of a part of the property replevied, and a judgment for plaintiff for the remaining property replevied, both parties recovered costs. *McLarren v. Thompson*, XL. 284.

19. Even under the Act of 1848, c. 73, the husband is not liable to the suit of the wife, and cannot recover costs against her. *Smith v. Gorman*, XLI. 405.

See OFFER, &c.

RECOGNIZANCE, 15.

(b) *Who is liable for costs as a party to the suit.*

20. A party who comes into a court of equity to redeem a mortgage, although entitled to redeem, must pay costs to a defendant who is not in fault. *Bourne v. Littlefield*, XXIX. 302.

21. In order for one to be a party, he must present himself on the docket of the Court, and be subject to costs on trial, if there should be one. *Moore v. Mann*, XXIX. 559.

22. In a petition for partition, where commissioners are appointed upon a default, and make a return, which is resisted by a written motion, this proceeding does not make those who file the motion parties, or subject them to costs. *Moore v. Mann*, XXIX. 559.

23. A *prochein ami*, under our statutes, is not a party to the suit in such a sense as to make him responsible for costs. *Leavitt v. Bangor*, XLI. 458.

## II. COSTS IN PARTICULAR CASES.

24. Under R. S., of 1841, c. 69, § 7, and c. 192 of the Acts of 1846, where the damages, in an action on a usurious note, are not reduced by the oath of the defendant, but by the voluntary act of the plaintiff, in indorsing the amount received as usurious on his note after the commencement of the suit, the defendant is not entitled to costs. *Cummings v. Blake*, XXIX. 105. *Hankerson v. Emery*, XXXVII. 16. *Lumberman's Bank v. Bearce*, XLI. 505.

25. A trustee, who does not disclose at the first term, is not entitled to costs arising at any subsequent stage of the case. *Warren v. Gibbs*, XXIX. 464.

26. One who resists, by written motion, the return of commissioners appointed on a petition for partition, is not subject to costs. *Moore v. Mann*, XXIX. 559.

27. Upon a defendant's complaint for costs, when the action against him has not been entered in Court, costs will be allowed against him, if he does not prove a service of a writ upon him. *Hodge v. Swazey*, XXX. 162.

28. Costs for defendants in chancery cases, except for special reasons, must be taxed within one year from the judgment. *Allen v. Haskell*, XXXI. 589.

29. In addition to the penalty for unlawfully selling spirituous liquor, costs may be awarded by a magistrate. *Ricker, pet'r*, XXXII. 37.

30. The proof, mentioned in the Act of 1846, c. 192, which entitles a defendant to costs, in cases of usury, may be that of his own affidavit alone, when not controlled by the oath of the creditor. *Bradford v. Fuller*, XXXIII. 176.



31. In an action, founded upon a judgment, and commenced within the time when an execution might have been issued thereon, but prior to R. S. of 1841, it was not erroneous to allow costs, although such action did not come to judgment till after the R. S. took effect. *Withee v. Preston*, xxxiii. 211.

32. When an appeal from the judgment of the District Court, sustaining a demurrer to a *scire facias* upon a recognizance for the appearance of a person charged with crime, is dismissed, the defendant is entitled to costs. *State v. Jackson*, xxxiii. 259.

33. In an action appealed from the District Court, the plaintiff, if he recover in this Court more than twenty dollars, as damages, is entitled to full costs in the District Court, although the verdict there in his favor was for less than twenty dollars. *Moore v. Thompson*, xxxiv. 207.

34. In adjudging upon the question of cost, in an equity suit, the conduct of the parties toward each other, in relation to the whole subject, may be taken into consideration. *Roby v. Skinner*, xxxiv. 270.

35. One, holding guaranty against the arrest of his person, after being arrested, can recover, upon the guaranty, none of the costs or expenses arising subsequently to the arrest. *Howard, J.*, dissenting. *Wing v. Chase*, xxxv. 260.

36. Where a surveyor was appointed on motion of defendants, and against the wishes of the plaintiff, and the defendants prevailed finally in the suit, the cost of the survey was taxed against the plaintiff. *Wesley v. Sargent*, xxxviii. 315.

37. A mortgagee in possession for foreclosure, who neglects to render an account of rents and profits on lawful demand, and claims a greater sum than is due upon the mortgage, is liable for costs in the suit to redeem. *Sprague v. Graham*, xxxviii. 328.

38. Under the provision of c. 125, § 16, when the respondent renders an account of the money due, and the rents and profits, in a reasonable time after demand, the complainant can recover no costs. *Kittredge v. McLaughlin*, xxxviii. 513.

39. Though the respondent has complied with the demand in rendering the account, yet, if he denies the right of the complainant to redeem when he is entitled to, he can recover no costs. *Kittredge v. McLaughlin*, xxxviii. 513.

40. In a submission at common law, containing no stipulation as to costs, the referees cannot award costs. *Hanson v. Webber*, xl. 194.

41. In an action of replevin, where there is a judgment for a return of a part of the property replevied, and a judgment for the plaintiff for the remaining property replevied, both parties recovered costs. *McLarren v. Thompson*, xl. 284.

42. In a suit upon a usurious note by a bank, the damages must be reduced by the oath of the defendant by reason of such usurious interest, in order to recover costs against the plaintiff. *Lumberman's Bank v. Bearce*, xli. 505.

43. A stockholder in a corporation is liable to costs in a suit by a creditor of the corporation against him, notwithstanding the amount of his stock may have been exhausted by the damage in said suit. *Cole v. Butler*, xliii. 401.

44. After interlocutory judgment for partition, no costs can be taxed for the petitioner against the respondent. *Ham v. Ham*, XLIII. 285.

See COUNTY COMMISSIONERS, 29.

### III. WHEN AFFECTED BY THE AMOUNT OF DAMAGES.

45. Where the plaintiff obtained a verdict in the District Court for eighty dollars as damages, and the defendant appealed, and the plaintiff obtained a verdict for only twenty dollars as damages in this Court, and, exceptions having been filed, the cause was continued:—*Held*, that the plaintiff must be restricted to the recovery of costs equal to one-quarter part only, of the amount of damages found by the jury. *SHEPLEY, J.*, dissenting. *Forbes v. Bethel*, XXVIII. 204.

46. Where, in assumpsit, a set-off is filed, and evidence is introduced by the parties in support of their respective claims, and the plaintiff obtains a verdict of less than twenty dollars, he is entitled to quarter costs only, unless the jury certify, in their verdict, that the damages were so reduced, by means of the set-off allowed to the defendant. *Thompson v. Thompson*, XXXI. 130.

47. In an action of case for obstructing a passage way, the defendant, by his pleadings, may bring the plaintiff's title into question. Such action, therefore, may be brought originally in the District Court, with a recovery of full costs, though the damage recovered should not exceed twenty dollars. *Sutherland v. Jackson*, XXXII. 80.

48. So, in an action for breach of warranty, in the conveyance of land. *Morrison v. Kittredge*, XXXII. 100.

49. If, in an action appealed from the District Court, the plaintiff recover in this Court more than twenty dollars, as damages, he is entitled to full costs in the District Court, although the verdict there was for less than twenty dollars. *Moore v. Thompson*, XXXIV. 207.

50. Full costs cannot be recovered in an action where the judgment is twenty dollars or less, notwithstanding such action is against a town for supplies furnished a pauper of that town, when the plaintiff claims under a contract with the overseers of the poor; notwithstanding the Act of 1842, c. 312, § 20. *Rawson v. New Sharon*, XLIII. 318.

### IV. TAXATION OF COSTS.

51. Costs for defendants, in chancery cases, except for special reasons, must be taxed within one year from the judgment. *Allen v. Haskell*, XXXI. 589.

52. Leave is properly given, at *Nisi Prius*, to file items of cost after the expiration of a year from the rendition of judgment, in equity, it being shown that the party has exercised due diligence. *Farley v. Bryant*, XLI. 400.

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### COUNTERFEITING.

See INDICTMENT, 70.

## COUPONS.

1. A coupon is an interest certificate, printed at the bottom of transferable bonds, given for a term of years. *Myers v. Y. & C. R. R. Co.*, XLIII. 232.

2. In the absence of proof of custom as to the negotiability of coupons, disconnected from the bonds with which they were issued, an independent negotiable character cannot be given them without the interposition of the Legislature, unless the intention of the party issuing them, distinctly so appears upon the face of the coupon itself. *Myers v. Y. & C. R. R. Co.*, XLIII. 232.

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## CO-TENANTS.

See JOINT-TENANTS AND TENANTS IN COMMON.

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## COUNTY.

1. Before an action can be maintained against the county to collect fees for committing persons to the house of correction, in Portland, such fees must be audited by the County Commissioners, and found to be due. *Huse v. Cumberland*, XXIX. 467.

2. The county treasurer is imperatively bound to pay the fees of the sheriff and other executive and ministerial officers in attendance at Court, when taxed by the Court. *Baker v. Johnson*, XLI. 15.

3. The law gives no remedy, by action against the county, for claims of this nature, neither is there any specific or adequate remedy against the treasurer, or upon his official bond, when he improperly withholds payment ordered by the Court. Under such circumstances, a *mandamus* may be sustained. *Baker v. Johnson*, XLI. 15.

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## COUNTY COMMISSIONERS.

1. There is no provision of law, by which the Atlantic & St. Lawrence Railroad Company can be compelled, by an order of the County Commissioners, to pay for the "services of the Commissioners and for their expenses, incurred while they were employed on petitions presented by the company to have the damages assessed, sustained by persons, by the location of that railroad over their lands. *A. & St. L. R. R. Co. v. C. Co. Com.* XXVIII. 112.

2. The interest of the petitioner, claiming damages occasioned by the location of a town way, is one of the questions to be submitted to the jury or committee. *Minot v. C. Co. Com.*, XXVIII. 121.

3. The power which County Commissioners exercise over roads, under the statute, is a judicial one; and the records of their proceeding and judgments, so long as they act within the sphere of their duty, cannot be incidentally impeached. *Longfellow v. Quinby*, xxix. 196. *Small v. Pennell*, xxxi. 267. *Plummer v. Waterville*, xxxii. 566.

4. Exceptions do not lie to the rulings of the District Court, in cases appealed from a decision of County Commissioners. *Banks v. Y. & C. Co. Com.*, xxix. 288.

5. There is no right of appeal from a joint decision of County Commissioners. *Banks v. Y. & C. Co. Com.*, xxix. 288.

6. Unfinished processes, commenced by the County Commissioners, for setting off the public lots in unincorporated places, under the Act of 1842, were defeated by the Act of 1848, transferring the care of the public lots to agents, appointed by the Governor and Council. *Co. Com. Pet'rs*, xxx. 221.

7. Such processes are not embraced in the clause of the latter act, "saving all actions now pending and causes of action already accrued." *Co. Com. Pet'rs*, xxx. 221.

8. Where a city charter gives an appeal to the District Court, to persons aggrieved by the doings of the city authorities as to damages done by the location of streets and ways, the appellate jurisdiction, given by the general law to County Commissioners, upon that subject is taken away. *Bangor v. P. Co. Com.* xxx. 270.

9. The authority, given to County Commissioners, R. S. of 1841, c. 25, § 31, relative to the assessment of damages created by the location of roads, is limited to roads established under the provisions of that chapter. *Bangor v. P. Co. Com.* xxx. 270.

10. County Commissioners are not bound to fix on the time and place for hearing parties, in their order of notice in relation to the alteration, location or discontinuance of a highway. An appointment for that purpose may be conveniently made at the close of the view. *Orono v. P. Co. Com.* xxx. 302.

11. Where the record of the County Commissioners, of their December term, 1844, states, that the petition for the road was presented at the preceding August term, 1844, and the survey and location of the road made in November; the inference is irresistible, that the location was made in November, 1844. *Orono v. P. Co. Com.* xxx. 302.

12. County Commissioners are not bound to adopt the language of the petition in their return; and where the courses and distances are given from one known terminus in the petition, though the other terminus may not have the same description as is in the petition, it is sufficient, if the record does not show any want of identity. *Orono v. P. Co. Com.* xxx. 302.

13. Where a highway is located by the Commissioners, and there are no applications for damages, a continuance of the petition to the then third regular session after their report was made, accepted and recorded, does not impair the legality of their proceedings. *Orono v. P. Co. Com.*, xxx. 302. *Detroit v. S. Co. Com.*, xxxv. 373.

14. Where the County Commissioners caused the reserved land to be set out by an actual location upon the earth, duly entered in the records of the District Court, the boundaries, thus fixed, are conclusive upon the public, whether they include one thousand acres or not. And the grantees of the township cannot object, that the land set out, does not contain one thousand

acres; for they may safely convey and warrant the adjoining lands, by such boundaries. Neither is the location invalidated by being taken in two lots, instead of one. *Dillingham v. Smith*, xxx. 370.

15. Where lumber had been cut upon the reserved lots, set out as above mentioned, and had been seized and sold by persons claiming to act for the public, it is competent for the purchaser to prove, by parol, that such persons were the acting County Commissioners. *Dillingham v. Smith*, xxx. 370.

16. Where County Commissioners have undertaken to locate a public way, their proceedings, until reversed, are valid, if they had jurisdiction to commence them, though their subsequent acts may have been erroneous. *Small v. Pennell*, xxxi. 267. *Plummer v. Waterville*, xxxii. 566.

17. Unless they had such jurisdiction, their doings are ineffectual, and may be avoided, even collaterally. *Small v. Pennell*, xxxi. 267. *Scarborough v. C. Co. Com.*, xli. 604.

18. A general jurisdiction over the subject matter is not, of itself, sufficient to give validity to their proceedings. *Small v. Pennell*, xxxi. 267.

19. A sufficient jurisdiction can be conferred, (in any case in which they may be called to act,) only by the preliminary measures prescribed therefor by law. *Small v. Pennell*, xxxi. 267. *Plummer v. Waterville*, xxxii. 566.

20. Where County Commissioners undertake to establish a town way, upon the reasonable neglect or refusal of the selectmen to locate it, their records, in order to be effectual, must disclose the facts upon which their jurisdiction is founded. *Small v. Pennell*, xxxi. 267.

21. In the establishment, by the Commissioners, of such a way:—*Held*, they had no jurisdiction in a case, where their records show neither a request made to the selectmen nor one made to the Commissioners; nor that any of the original petitioners had applied in writing to the Commissioners, nor that application, by any one, had been made to them, within a year from the neglect or refusal of the selectmen. *Small v. Pennell*, xxxi. 267.

22. Parol testimony, offered, not to prove a lost record of County Commissioners, but as a substitute for such a record, is inadmissible. *Small v. Pennell*, xxxi. 267.

23. An appeal from County Commissioners, on a petition for the establishment of a highway, opens to the consideration of the committee the whole proceedings under the petition. *Winslow v. K. Co. Com.*, xxxi. 444.

24. If the Commissioners established a portion of the road prayed for, and refused to establish the other portion, the committee may establish the whole road. *Winslow v. K. Co. Com.*, xxxi. 444.

25. Where the Commissioners have established one portion of the road prayed for, and, in their report, made no mention of the remaining portion, their silence, in that respect, is to be considered a refusal by them to establish such remaining part. *Winslow v. K. Co. Com.*, xxxi. 444.

26. The statute of 1847, c. 28, § 3, requires the report of committees, appointed upon appeal from County Commissioners, to be made at the term of the District Court, "next after their appointment." *Windham, pet'rs*, xxxii. 452.

27. Unless such report be made at such "next term," a subsequent acceptance of their report, by the District Court, is irregular and void. *Windham, pet'rs*, xxxii. 452.

28. When County Commissioners close their proceedings earlier than is allowed by law, their proceedings are irregular. *Windham, pet'rs*, xxxii. 452.

29. The District Court, on an appeal from County Commissioners, as to highways, have no authority to award costs against the original petitioners. *Jordan, pet'r*, xxxii. 472.

30. Whether an appeal can lie to the District Court from the County Commissioners, in the matter of a town way; *quere*. *Jordan, pet'r*, xxxii. 472.

31. Whether, in rendering a judgment, the County Commissioners had jurisdiction, must appear from their records. *Plummer v. Waterville*, xxxii. 566. *Scarborough v. C. Co. Com.*, xli. 604.

32. A petition to the County Commissioners, placed upon their records, stating certain facts, and invoking their action, in a matter within the scope of their duty, growing out of such facts, gives them jurisdiction. *Plummer v. Waterville*, xxxii. 566.

33. Although the statute remedy, authorizing a jury to assess damages in behalf of one over whose land a town road had been located, is called an "appeal," still, it is an appeal to no other extent than that it allows the same question to be examined by another tribunal. *Plummer v. Waterville*, xxxii. 566.

34. R. S. of 1841, c. 25, § 3, requires that the return by the County Commissioners, of a location of a highway, shall be recorded at the next term after their proceedings shall have been finished. *Cornville v. S. Co. Com.*, xxxiii. 237.

35. A written petition to the County Commissioners for the establishment of a county road, gives jurisdiction to them. *Waldo v. Moore*, xxxiii. 511.

36. When the county has incurred expense by the proceedings upon such a petition, the prayer of which is denied, the County is entitled to an adjudication by the Commissioners, that the same be repaid by the petitioners. *Waldo v. Moore*, xxxiii. 511.

37. In order to the maintenance of a suit by the County, upon such an adjudication, the record ought to show a party in whose favor, as well as one against whom, it is rendered. *Waldo v. Moore*, xxxiii. 511.

38. In such a case, if the record did show to whom the money was to be paid, or if the declaration did specially set forth the facts upon which they claim to have been entitled to it, together with all the necessary averments, although the action might be maintained under § 21, of c. 99, of R. S. of 1841, still the question might arise whether the plaintiffs were entitled, by law, to the money. *Waldo v. Moore*, xxxiii. 511.

39. County Commissioners, designated *eo nomine* to audit bills of expenditure in the improvements of a river to facilitate the driving of lumber, act, when auditing such bills, as individuals, and not as a judicial court. And no entry of their doings need be recorded on their records, although the rate of toll for the use of the improvements be made to depend upon the amount of expenditure, as thus ascertained. *Machias R. Co. v. Pope*, xxxv. 19.

40. County Commissioners' appraisement of the damage done to an individual by the location of a railroad across his land, may be revised by a jury, as well upon the application of the railroad corporation, as upon that of the land owner. *Kimball v. K. & P. R. R. Co.*, xxxv. 255.

41. Natural objects are "durable monuments to be erected at the angles" of a location of a highway by the County Commissioners, within § 4, of c. 25, of R. S. of 1841. *Detroit v. S. Co. Com.*, xxxv. 373.

42. "The top of a narrow horseback," on which a location is made, extending through many courses and distances, may be adopted as furnishing a

sufficient monument at each of the angles. *Detroit v. S. Co. Com.*, xxxv. 373.

43. The Act of 1845, authorizing the County Commissioners to grant permits for the cutting of timber upon the public lots, was repealed in 1848, and the repeal terminated the Commissioners' authority to grant such permits. *Small v. Small*, xxxv. 400.

44. Permits, under the Act of 1845, could only be operative for one year. *Small v. Small*, xxxv. 400.

45. Thus, a permit for cutting all the timber upon a public lot, though to be cut in such quantities yearly as the Act allowed, was held to be inoperative at the end of one year, and to furnish no protection to the purchaser to cut after that time. *Small v. Small*, xxxv. 400.

46. The court of County Commissioners is not a court of record. *Woodman v. Somerset*, xxxvii. 29.

47. The statute of limitations may legally be interposed to actions commenced on the judgments of County Commissioners' Court, after six years. *Woodman v. Somerset*, xxxvii. 29.

48. A petition for the location of a county road is sufficiently definite, if it sets forth its termini, and the general course between them. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

49. So, if a petition presents alternative places, each accurately described, for the commencement of a way, it is sufficient. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

50. Where actual notice has been given to parties interested in the location of a county road, the want of the statute notice will not avail to quash proceedings, unless some right has been lost or some injury suffered by reason of the omission. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

51. Parties, interested in the settlement of an agent's account for opening a county road, may be cited to appear at an adjourned term of the Commissioner's Court. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

52. An agent's account for opening a county road, may lawfully be allowed at such adjourned term. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

53. If no formal judgment is found upon the County Commissioners' records, of the amount of a distress warrant, by them issued, and the sum for which it is issued is properly ascertained, it will not impair their proceedings. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

54. The warrant of distress, issued by County Commissioners, is no part of the record to be presented in a writ of *certiorari*. *Sumner v. Oxford Co. Com.*, xxxvii. 112.

55. The authority of this Court over appeals from County Commissioners, under c. 28, of the statutes of 1847, is limited to the appointment of a committee, action upon their report, and upon its acceptance, entering judgment and forthwith certifying the same to the Commissioners. *Brunswick v. C. Co. Com.*, xxxvii. 446.

56. The report of such committee can only be impeached for error, fraud or gross partiality. *Brunswick v. C. Co. Com.* xxxvii. 446.

57. The Commissioners are not required to follow minutely the line indicated in the petition; but a substantial observance of the route indicated in the petition is all that is required. *Wayne v. K. Co. Com.* xxxvii. 558.

58. Where neither public nor private injury appears to have been sustain-

ed, by a slight deviation in the road as located, from that prayed for, the Court, in the exercise of its discretionary power, will not interpose to vacate the proceedings. *Wayne v. K. Co. Com.*, xxvii. 558.

59. By c. 196, § 1, of statutes of 1841, before a road can be located across lands not situated within an organized plantation or incorporated town, notice must be given of the pendency of the petition, and of the time and place appointed to consider the same and adjudicate thereon. *Ware v. P. Co. Com.*, xxxviii. 492.

60. A determination, by the Commissioners, at whose expense the way is to be made, is essential to the validity of their proceedings. *Ware v. P. Co. Com.*, xxxviii. 492.

61. None but parties to the record, in an appeal from the County Commissioners, can take exceptions to the rulings of this Court. *Ripley v. S. Co. Com.*, xxxix. 350.

62. County Commissioners are not parties in an appeal from their decision. *Ripley v. S. Co. Com.*, xxxix. 350.

63. County Commissioners are authorized by law to lay out a way wholly within the limits of a town. *Hermon v. P. Co. Com.*, xxxix. 583. *Smith v. C. Co. Com.*, xlii. 395.

64. To entitle the County Commissioners to their appellate jurisdiction, it must appear that the town had the opportunity of knowing fully upon what it was called upon to act, in its corporate capacity, touching the acceptance of the way in question; and that, with such knowledge, they unreasonably refused to approve and allow the town way or private way laid out by the selectmen. *Guilford v. P. Co. Com.*, xl. 296.

65. The proceedings of the Commissioners will be void, in allowing and approving such town way, unless the petition or record shows, that the laying out of the town way, with "the boundaries and admeasurements" of the same, was reported to the town, and the location filed with the town clerk seven days at least before the meeting for acceptance. *Guilford v. P. Co. Com.*, xl. 296.

66. County Commissioners have no power to locate highways over creeks or arms of the sea which are navigable, and construct bridges so as to impede their use for the purposes of navigation. *State v. Anthoine*, xl. 435.

67. And bridges, constructed over such waters by their authority, may be removed by any person impeded thereby. *State v. Anthoine*, xl. 435.

68. County Commissioners have not jurisdiction in all cases of refusal by towns to approve and allow of ways laid out by their selectmen. *Scarborough v. C. Co. Com.*, xli. 604.

69. The Commissioners obtain jurisdiction only when the petition on record presents a case within the provisions of statute. *Scarborough v. C. Co. Com.*, xli. 604.

70. Thus, under R. S. of 1841, c. 25, § 34, County Commissioners can act only upon a petition of some person aggrieved by such refusal or delay, "if such way lead from land under his possession and improvement to any highway or town way." *Scarborough v. C. Co. Com.*, xli. 604.

71. The Act of 1853, c. 26, amending the Act of 1852, c. 221, was prospective in its operation. *Smith v. C. Co. Com.*, xlii. 395.

72. When an appeal is taken from County Commissioners, in reference to the location, &c., of a highway, all further proceedings by the Commissioners



are suspended. If the appellate court decide wholly against the doings of the Commissioners, it ends them; if it wholly affirm them, they will proceed from the point which they had reached when the appeal was taken; if it affirm them in part only, they will complete their work in conformity with the judgment of the appellate court. *Smith v. C. Co. Com.*, XLII. 395.

See ACTION, 18.

AMENDMENT, 25.

## COURT MARTIAL.

Where a captain in the militia was deposed by the sentence of a court martial, and afterwards was prosecuted by the ensign for not performing military duty, he has a right to inquire into the legality of the proceedings of the court martial. *Crawford v. Howard*, XXX. 422.

## COURT AND JURY.

See LAW AND FACT.

## COURTS IN GENERAL.

1. Where it appears from the docket, that a party with his surety recognized to prosecute an appeal from the District Court to this Court, and the clerk died before the recognizance was extended upon the record, a subsequent clerk, by direction of the Court, may complete the imperfect record. But the new clerk has no authority to do it without such direction. *Longley v. Vose*, XXVII. 179.

2. Courts of record have control over its own records and proceedings, as long as they remain incomplete, and until final judgment has been rendered; and until then, it is the established practice in such Courts to regard all actions, whether on the docket of the existing or a former term, as within the jurisdiction and control of the Court. *Woodcock v. Parker*, XXXV. 138. *Lewis v. Ross*, XXXVII. 230.

3. Thus, a Court may bring forward, from a previous term, any uncompleted action, and alter the docket entry pertaining to it. *Woodcock v. Parker*, XXXV. 138.

4. If the record of a judgment of a Court of record is incomplete, through the mistake of its clerk, it may be corrected, *after any lapse of time*, by the Court. *Lewis v. Ross*, XXXVII. 230.

## COURT OF RECORD.

1. Whether a court be a court of record, does not depend upon the fact, that it does or does not keep a record of its proceedings, or that it is or is not required by law to do so. *Woodman v. Somerset*, xxxvii. 29.

2. After final judgment in a court of record, proceeding according to the common law, the only remedy for a correction of its errors is a writ of error. When it is not a court of record, or does not proceed according to the common law, *certiorari* and *not error*, is the remedy. *Woodman v. Somerset*, xxxvii. 29.

3. A court of record is one, which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings, and proceeding according to the course of the common law. *Woodman v. Somerset*, xxxvii. 29.

4. The Court of County Commissioners is not a court of record. *Woodman v. Somerset*, xxxvii. 29.

## COVENANT.

## I. COVENANT REAL.

## II. CONSTRUCTION, PERFORMANCE, AND BREACH.

## III. GENERALLY.

## I. COVENANT REAL.

1. When a grantee has been evicted by virtue of a judgment against him, that judgment is admissible, in an action upon the covenants of the deed, to prove eviction, but not without notice, to prove the superior title of the recovering party. But if the grantor had notice of, and an opportunity to defend, that suit, it is evidence of the title of the party recovering. *Hardy v. Nelson*, xxvii. 525.

2. Upon the breach of warranty in a deed of land, where the grantor was seized when he made the conveyance, and the grantee entered and continued in possession until evicted, the measure of damages is the value of the premises, at the time of eviction, with interest, and the expenses reasonably and actually incurred in the defence of the suit. *Hardy v. Nelson*, xxvii. 525.

3. By the common law, the covenant of warranty in a deed of land, if not released or annulled, ordinarily runs with the land to the last purchaser, even by a deed of release. *Brown v. Staples*, xxviii. 497. *Crooker v. Jewell*, xxix. 527.

4. Where land is conveyed by deed of warranty, and the same premises, at the same time, are conveyed in mortgage, with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed. *Brown v. Staples*, xxviii. 497.

5. The warrantee of land, while he continues the owner, may release or annul the covenants. But if the covenants be not discharged or annulled,

and pass with the land by another conveyance, the first grantee cannot annul them, unless he has been called upon and has paid damages to his grantee for a breach of his own covenants. *Brown v. Staples*, xxviii. 497. *Crooker v. Jewell*, xxix. 527.

6. When the warrantee, who has given to his grantor a bond covenanting to discharge a mortgage thereon, has deceased, and his estate is insolvent, all claims existing between the estate and obligee, must be settled before the commissioners of insolvency; and the covenants of warranty in the deed will be thereby rendered insolvent. *Brown v. Staples*, xxviii. 497.

7. Where a covenant which runs with the land, is broken, he in whose time it is broken, whether the grantee or any one who claims and holds under him, may maintain an action for the breach. *Crooker v. Jewell*, xxix. 527. *Allen v. Little*, xxxvi. 170.

8. One of the grantees in a series of conveyances with warranty, can have no action against his grantor for breach of warranty, occurring after having himself conveyed the land. *Crooker v. Jewell*, xxix. 527.

9. The act of the tenant, in vouching his immediate warrantors, does not impair his remedy against a previous warrantor. *Crooker v. Jewell*, xxix. 527.

10. But covenants of seizin and freedom from incumbrances, are personal covenants *in presenti*, at common law, and unassignable. And by R. S. of 1841, c. 115, § § 16 and 17, such covenants may pass to the grantee's assignee, with a right to maintain a suit in his own name for their breach:—*Provided*, he shall file in court, at the first term, for the use of his grantor, a release of the covenants in his grantor's deed, and all causes of action on any such covenants. *Prescott v. Hobbs*, xxx. 345. *Allen v. Little*, xxxvi. 170.

11. Where a second mortgagee of land, ignorant of a prior mortgage, discharged the second mortgage, in consideration of a quitclaim deed of the land from the mortgager, with covenants of warranty against all claims under or through him; said grantee, after purchasing the outstanding mortgage and debt secured by it, may recover upon said covenants, the amount paid for the purchase:—*Provided*, it does not exceed the amount due upon the mortgage note. *Cole v. Lee*, xxx. 392.

12. The law has not prescribed any particular form of words necessary to constitute a covenant. *Cole v. Lee*, xxx. 392.

13. A prior mortgage is a legal claim, in the nature of an incumbrance. *Cole v. Lee*, xxx. 392.

14. A subsequent grantee may at any time discharge a prior mortgage, and resort to his covenants for redress, though no measures have been taken to deprive him of the possession of the land. *Cole v. Lee*, xxx. 392.

15. In a suit upon the covenants in a warranty deed, nominal damages only will be recovered, unless the incumbrances have been discharged, although the plaintiff has yielded to an entry and possession by the incumbrancer. *Copeland v. Copeland*, xxx. 446. *Stowell v. Bennett*, xxxiv. 422. *Reed v. Pierce*, xxxvi. 455.

16. Where one grants land, which was incumbered by an outstanding mortgage, and the mortgage is afterwards foreclosed, the measure of damages to be recovered by such grantee, on the covenant of warranty, is the value of the land at the time of eviction, with interest from that time, together with the value of such improvements as the covenantee has made. *Elder v. True*, xxxii. 104.

17. An inchoate right of dower is an existing incumbrance on the land, within the meaning of the covenant against incumbrances. *Smith v. Cannell*, xxxii. 123.

18. Where land is conveyed with covenants of general warranty, and, at the same time, is re-conveyed in mortgage, with like covenants, no action upon the mortgage covenants can be maintained by the mortgagee or his assignee. *Smith v. Cannell*, xxxii. 123.

19. As between the parties in such a transaction, the purchaser really pledges nothing but the interest, which he obtained under the deed to him, and is answerable to his grantor for no imperfection existing in the title before the conveyance. *Smith v. Cannell*, xxxii. 123.

20. If the owner of land have released the covenants in the deed of his grantor, no action can be maintained thereon by any subsequent assignee of the land. *Littlefield v. Getchell*, xxxii. 390.

21. In order to protect the grantor against such an action, it is not necessary that the release be recorded. *Littlefield v. Getchell*, xxxii. 390.

22. A covenant against incumbrances by a grantor in a deed of land, does not estop him from setting up a subsequently acquired title. *Sweetser v. Lowell*, xxxiii. 446.

23. The covenants, "that the grantor will never make any claim to the land, and that he will warrant and defend the same free from all incumbrances by him made," will not estop him from claiming the land under a title *subsequently acquired* by him. WELLS, J., dissenting. *Partridge v. Patten*, xxxiii. 483.

24. A covenant, in a deed of land, which is broken at the moment of its execution, does not run with the land, and, at common law, no action upon it can be maintained by an assignee. *Ballard v. Child*, xxxiv. 355.

25. R. S. of 1841, c. 115, § § 16 and 17, giving to assignees the right of action upon such covenants, extends only to cases in which an eviction had occurred. *Ballard v. Child*, xxxiv. 355.

26. Where no seizin passes by the conveyance, and no possession is taken, there can be no eviction. *Ballard v. Child*, xxxiv. 355.

27. General covenants of warranty, in a deed of lands, are prospective, and run with the estate, and vest in assignees and descend to heirs. *Allen v. Little*, xxxvi. 170.

28. When there has been a severance of a joint estate, and the legal interest is several, each must sue separately for his damages for breach of the covenants which run with the estate. *Allen v. Little*, xxxvi. 170.

29. In this State, an intermediate covenantee cannot maintain an action against a prior covenantor, until he has suffered damage. *Allen v. Little*, xxxvi. 170.

## II. CONSTRUCTION, PERFORMANCE AND BREACH.

30. If the buildings only, and not the land on which they stand, are conveyed by deed, the covenant therein, that the grantor will not claim "any right or title to the aforesaid premises," applies only to the buildings, and can have no influence upon any title to the land subsequently acquired by the grantor. *Derby v. Jones*, xxvii. 357.

31. Covenants, that premises, described by metes and bounds, without reservation or exception, are "free of all incumbrances, except the dower of J. S.," and that the grantor "will warrant and defend the same against the lawful claims and demands of all persons, except the claim of the aforesaid dower," are so restricted, that they will not bind the grantor to warrant or defend against the life-estate, assigned as dower. *Hardy v. Nelson*, xxvii. 525.

32. A covenant of warranty does not include an incumbrance which the grantee, by an instrument of as high a nature as the deed, has engaged to discharge; and the grantee, or a second grantee with notice, cannot enforce such covenant as an estoppel, against a covenant of warranty, by himself, of the same premises to his grantor. *Brown v. Staples*, xxviii. 497.

33. A covenant, that shares in a manufacturing corporation are free from all incumbrance, is broken, if the shares of the stockholders were made liable for the debts of the corporation, and if, at the time of the sale, the assets of the corporation are not equal to its liabilities. *Clark v. Perry*, xxx. 148.

34. A prior mortgage is a legal claim, in the nature of an incumbrance. And a subsequent grantee has a right, at any time, to discharge it, and resort to his covenants for redress, though no measures have been taken to deprive him of possession. *Cole v. Lee*, xxx. 392.

35. Where a warranty deed of land is given, subject to a lien claim, and the grantee agrees in writing, as a part of the consideration, that he will extinguish the lien, such lien is not a breach of the covenants in the deed, upon which the grantee may maintain an action, to be indemnified for loss by such lien. *Copeland v. Copeland*, xxx. 446.

36. The covenant of seizin, in a deed of conveyance, is not broken, where the grantor's lessee has had exclusive occupation of the land, for the next preceding thirty-one years. *Ginn v. Hancock*, xxxi. 42.

37. The right of a corporation to maintain permanently upon the land of a covenantor, dams, sluices and locks, is an incumbrance within the import of a warranty against incumbrances, in his deed to a third person. *Ginn v. Hancock*, xxxi. 42.

38. A joint covenant by two or more persons, that they will not do a specified act, which it was lawful for either of them to do alone, is broken whenever the act is done by either of them. *Wing v. Chase*, xxxv. 260.

39. An outstanding, unpaid mortgage, constitutes a breach of the covenant against incumbrances. *Reed v. Pierce*, xxxvi. 455.

40. For such a breach, a right of action accrues immediately. *Reed v. Pierce*, xxxvi. 455.

41. In such an action, if the plaintiff had extinguished the mortgage, the measure of damage would be the sum rightfully paid thereon; but if he had not extinguished it, the damage would be nominal. *Reed v. Pierce*, xxxvi. 455.

42. The covenant of warranty against the lawful claims of all persons is not broken until eviction by paramount title. *Reed v. Pierce*, xxxvi. 455.

43. Until such eviction, therefore, no right of action arises upon such a covenant. *Reed v. Pierce*, xxxvi. 455.

44. A public road is an easement, the existence of which over a part of a lot of land, conveyed by deed of warranty, is a breach of those covenants. *Haynes v. Young*, xxxvi. 557.

45. A covenant by the vendee of certain bank shares, that he would indemnify and save harmless his vendor from any and all liabilities he may

have incurred as stockholder, or from any loss or damage he may sustain from or on account of that capacity, is limited to such liabilities for damages as are recoverable by law of his vendor. *Merrill v. Shaw*, xxxviii. 267.

47. Where plaintiff had sold to defendant certain shares in the F. bank, and took his covenant against loss or damage on account of having once owned them; and, when the charter was repealed, was appointed, and he acted, as one of the receivers of the bank; and in a suit against it, after such appointment, had wrongfully agreed to a judgment against the bank, upon which judgment his own property was taken in part satisfaction for having owned such shares; for all expenses by him incurred in obtaining a reversal of such judgment, and expenses and time in defending judicial proceedings growing out of such illegal judgment, he has no claim upon the covenant. *Merrill v. Shaw*, xxxviii. 267.

48. A covenant, that one is seized in fee of an undivided portion of the premises conveyed, when partition had previously been made among the several owners, of which he was ignorant, is broken by such partition. *Morrison v. McArthur*, xliii. 567.

### III. GENERALLY.

49. A receipt not under seal, cannot be regarded as a release of the covenants in a deed, which is not apparently referred to in the receipt; for "covenant by deed must be discharged by deed." *Heath v. Whidden*, xxix. 108.

50. The act of the tenant, in vouching his immediate warrantors, does not impair his remedy against a previous warrantor. *Crooker v. Jewell*, xxix. 527.

51. A covenant, that the lessee shall pay the rent and peaceably give up the possession at the end of the term, "and for such further time as the lessees may hold the same," is a security both for the surrender of the estate, and for the rent during the occupation. *Kendall v. Moore*, xxx. 327.

52. Where the owner of a mill-dam stipulated under seal, that he would reduce the height of his dam to a specified point, and forever keep it reduced to that point; and the owner of land, flowed by said dam, granted a right to flow his land by the dam, while it continued reduced to the stipulated point, reserving, however, the right to annul the grant, whenever the dam should be raised above that point:—*Held*,—

1st. That the covenant of the owner of the dam to keep its height reduced, was an independent covenant:—

2d. That the contingent reservation by the land-owner, to annul his grant, gave no election to the owner of the dam to raise it, after having once reduced it to the stipulated point:—

3d. That such a reservation furnished no protection to the dam-owner, in a suit upon his covenant to keep the dam reduced:—and—

4th. That, whatever previously acquired right of maintaining the dam at its original height, may have vested in the owner, he is precluded, by his covenant, from setting up such previous right as a defence. *Stinson v. Gardiner*, xxxiii. 94.

53. A. executed a bill of sale to B., with covenants of warranty, of three-eighths of a vessel, and C. and D. executed to him a like bill of sale of four-eighths of the same vessel:—*Held*, that B. would have a remedy upon the covenants in the bills of sale, for the money paid by him to discharge an in-

cumbrance upon the vessel, existing at the time of sale. *Stoddard v. Gage*, xli. 287.

54. Covenantants in a deed are qualified and limited by the grant, and cannot enlarge it. *Coe v. persons unknown*, xliii. 432.

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## COVERTURE.

See HUSBAND AND WIFE.

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## CREDITOR AND DEBTOR.

If the officer wastes the goods seized, or misappropriates the money derived from their sale, or fails to return the execution, the debtor is thereby discharged. *Fuller v. Loring*, xlii. 481.

See FRAUD AND FRAUDULENT CONVEYANCE.  
POOR DEBTORS.

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## CRIMINAL LAW.

1. Where a jury has been empanelled and have rendered a verdict of acquittal, and judgment has been entered thereon, though there has been no evidence adduced against the accused, he cannot again be put upon trial for the same offence. *Stevens v. Fassett*, xxvii. 266.

2. Where proceedings are upon a complaint and warrant, before a justice of the peace, in a matter where he has final jurisdiction, the prisoner has been arraigned, and tried, discharged as not guilty, and judgment entered, he cannot again be put upon trial under another similar complaint and warrant for the same offence. *Stevens v. Fassett*, xxvii. 266.

See COMPLAINT.  
INDICTMENT.

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## CURTILAGE.

1. The curtilage of a dwellinghouse is a space necessary and convenient, and habitually used for family purposes, for the carrying on of domestic employments. It includes the garden, if there be one. It need not be separated from the other lands by fences. *State v. Shaw*, xxxi. 523.

2. To constitute a curtilage, there must be an actual occupation of the

dwellinghouse, by some person or persons. It is not sufficient that it was designed to be, and capable of being occupied for a dwellinghouse. *State v. Warren*, xxxiii. 30.

## CUSTOM.

1. Upon a dispute as to the contract upon which a ship-master sailed a vessel, evidence of custom is admissible. *Perkins v. Jordan*, xxxv. 23.

See ASSUMPSIT, 20.

EASEMENT.

PRESCRIPTION.

## DAMAGES.

I. IN ACTIONS ON TORTS.

II. IN ACTIONS ON CONTRACTS.

III. UNDER STATUTES.

*For Damages in Dower*, See DOWER, 57.

I. IN ACTIONS ON TORTS.

- (a) AGAINST OFFICERS.
- (b) REPLEVIN.
- (c) LIBEL AND SLANDER.
- (d) TRESPASS.
- (e) TROVER.
- (f) OTHER INJURIES.

(a) *Against Officers.*

1. In a suit against an officer, who had taken a receipt for property attached upon a writ, for not delivering the property or the receipt, the defendant cannot show, in mitigation of damages, that the property was of a value less than that alleged in his return upon the writ. *Allen v. Doyle*, xxxiii. 420.

2. An officer, who, having authority to remove from the street the building of another person, sells part of its materials, will be deemed a trespasser *ab initio*, and held chargeable for the whole value of the building. *Muzzey v. Cahoon*, xxxiv. 74.

3. If an officer, before replevying property, do not take a bond in double its true value, and the defendant in replevin suffer damage thereby, the officer is liable to the amount of injury thereby occasioned; *provided*, it do not exceed the amount of the true penalty of such bond. *Kimball v. True*, xxxiv. 84.

4. By statute of 1848, c. 71, § 2, if an officer "shall detain any offender, without warrant, longer than such time as was necessary to procure a legal



warrant, such officer shall be liable to pay all such damages as the person detained shall suffer thereby." *Burke v. Bell*, xxxvi. 317.

5. An officer who seizes and sells goods as the property of a debtor, which do not belong to such debtor, is a joint trespasser with the purchaser; and both will be held responsible to the owner for damages accruing to him from such sale. *Symonds v. Hall*, xxxvii. 354.

6. An officer who attaches property on mesne process and sells it thereon, without the consent of the creditor and owner, or otherwise than by the mode prescribed in R. S. of 1841, c. 114, § 53, becomes a trespasser *ab initio*, and liable for the value of the property so sold, and interest since the sale. *Ross v. Philbrick*, xxxix. 29.

7. An officer must account for the value of goods sold by him not in accordance with law; and for those sold according to law, he is liable for the amount of the sales, with interest from the time of sale, deducting the expenses of keeping and selling the same. *Lovett v. Pike*, xli. 340.

8. If a deputy sheriff purchase a portion of goods attached by him, and sold at auction, the purchase is a conversion, for which an action of trover will lie; but the amount paid therefor, if allowed in the execution, may be shown in reduction of damages. If the sale was for a fair price, and the proceeds accounted for to the creditor, he has no just cause of complaint. *Lovett v. Pike*, xli. 340.

#### (b) *Replevin*.

9. The damages recovered by the attaching officer in an action of replevin, being recovered in trust, are not conclusive upon the parties in a suit upon the replevin bond. *Howe v. Handley*, xxviii. 241.

10. Where the value of the property replevied might be expected to be diminished by the use of it, and by lapse of time, the obligors in the replevin bond should be bound by the value of the property named in the bond. *Howe v. Handley*, xxviii. 241.

11. When the original debtor has received a discharge in bankruptcy, and his assignee has discharged all claim against the officer for the property attached, the damages to be recovered in an action upon the replevin bond, to be retained for the plaintiff's own use, are the amount of the judgment for costs recovered in the action of replevin, with interest from the time of judgment, his reasonable expenses incurred in that action, and interest for the same time, and his reasonable expenses incurred in the suit upon the bond; and also, to recover, for the use of the creditor, interest at the rate of twelve per cent. per annum on the value of the goods, as alleged in the bonds, from the time of the recovery of his judgment to the time when the attachment was dissolved. *Howe v. Handley*, xxviii. 241.

12. In replevin, submitted for decision on questions of law, without any stipulation as to the allowance of damages, the Court, at another term, after judgment of nonsuit and return, has no power to assess the defendant's damages, or to submit that question to a jury. *Dillingham v. Smith*, xxxii. 182.

13. If, in a judgment for return in a replevin suit, there be no assessment of damages occasioned by the detention, and if, upon the restitution writ, no return of the goods was obtained, the damage for the detention, computed from the original taking, may be assessed and allowed in an action upon the replevin bond. *Smith v. Dillingham*, xxxiii. 384.

(c) *Libel and Slander.*

14. The amount of damages recoverable in an action of slander, for words actionable in themselves, is to be computed by the jury. *Newbit v. Shatuck*, xxxv. 315.

15. For words, actionable in themselves, the law implies malice, and that some damages arises therefrom. And in addition to implied malice, plaintiff may prove express malice, to increase damages. *True v. Plumley*, xxxvi. 466.

16. In slander, brought by a married female, one count charged adultery, and another, that she was a whore:—*Held*, that proof of adultery would defeat a recovery upon the first count, and would mitigate, but not defeat, a recovery of damage upon the other. *True v. Plumley*, xxxvi. 466.

17. In such an action, it is proper that the jury, in assessing the damage, should regard the probable future as well as the actual past. *True v. Plumley*, xxxvi. 466.

See LIBEL AND SLANDER.

(d) *Trespass.*

18. In trespass, damages are given as compensation, recompense or satisfaction to the plaintiff for the injury actually received by him from the defendant; and they must be the natural and proximate consequence of the act complained of. *Longfellow v. Quimby*, xxix. 196.

19. The trouble of looking after trespassers is not of this character. *Longfellow v. Quimby*, xxix. 196.

20. The law does not recognize interest as the exact measure of damages for the detention of property taken in trespass in addition to its value. *Longfellow v. Quimby*, xxix. 196.

21. In an action of trespass by an execution creditor, (who had set off by levy his debtor's life estate in land belonging to the debtor's wife,) against the debtor for entering and cutting trees upon such land, the damage which the creditor is entitled to recover, will not extend to trees belonging to the inheritance, the cutting of which by the creditor would be waste. *McKeen v. Gammon*, xxxiii. 187.

22. In trespass, by a proprietor of land, for cutting and carrying away growing trees, the plaintiff is entitled to recover for the value of the trees, and for the injury occasioned by cutting them prematurely, and for the injury done to the land, with damages at the rate of six per cent. per annum. *Longfellow v. Quimby*, xxxiii. 457.

23. In trespass for injury to personal property, owned by plaintiffs jointly with other co-tenants, damages may be recovered in proportion to the plaintiff's ownership. *Jones v. Lowell*, xxxv. 538.

24. The only criterion for damages in trespass for taking and carrying away personal property, is the value of the property when taken. *Ham v. Sawyer*, xxxviii. 37.

25. But where a collector of taxes had seized and sold plaintiff's house, for a void tax, and had refunded the overplus, in an action of trespass, such overplus was deducted from the value of the house. *Ham v. Sawyer*, xxxviii. 37.

26. In trespass for assault and battery, where the act was wantonly done,

the plaintiff may recover for the mental anxiety, public degradation and wounded sensibility which an honorable man would feel, and which he suffered under such a violation of the sacredness of his person. *Wadsworth v. Treat*, XLIII. 163.

27. Where the defendant co-operated with the co-tenants of the plaintiff wrongfully, in tearing down an old mill and erecting a new one, at large expense, the plaintiff can recover but nominal damages. *Jewett v. Whiting*, XLIII. 242.

28. When damage is caused by the flow of water from a dam, the owners thereof are liable to the full amount of the injury, where there is no negligence on the part of the plaintiff, notwithstanding the injury might have been prevented by an expenditure less than the amount of the damage. *Reynolds v. C. River Co.*, XLIII. 513.

(e) *Trover.*

29. Where one, having tortiously cut and carried away trees from the land of another, sells a part of them to a third person, who had no knowledge of the wrong, the owner, even if he can maintain an action of trover against them jointly, can recover of the *vendee* only the value of the part purchased. *Moody v. Whitney*, XXXIV. 563.

30. Ordinarily, the measure of damages in trover for unrestored property, is the value of it at the time of its conversion, with interest. *Hayden v. Bartlett*, XXXV. 203.

31. In an action of trover for the conversion of timber, which defendants had cut on plaintiff's land, hauled three miles and deposited on another piece of land belonging to plaintiff, and near his mill, the measure of damages is its value when first separated from the freehold. *Moody v. Whitney*, XXXVIII. 174.

32. If a deputy sheriff purchase a portion of the goods attached by him, and sold at auction, the purchase is a conversion, for which an action of trover will lie; but the amount paid therefor, if allowed on the execution, may be shown in reduction of damages. *Lovett v. Pike*, XLI. 340.

(f) *Other Injuries.*

33. Damages are given as compensation, recompense or satisfaction to the plaintiff for the injury actually received; and they must be the natural and proximate consequence of the act complained of. *Longfellow v. Quimby*, XXIX. 196. *Worcester v. G. F. M. Co.*, XLI. 159.

34. Damages are recoverable for an injury to a mill lawfully existing, occasioned by the erection of any dam, unless the right to maintain such mill shall have been lost or defeated. *Thomas v. Hill*, XXXI. 252.

35. In a suit to recover for an injury done to the plaintiff's horse, through the unskillfulness of the defendant, the expenses of doctoring and taking care of it cannot be recovered, unless declared for specially. *Patten v. Libbey*, XXXII. 378.

36. In trespass for a horse illegally sold by a collector of taxes, the plaintiff having received the surplus of the sale above the tax and costs, damages are to be entered up for the value of the horse, less such surplus. *Ham v. Sawyer*, XXXVIII. 37.

37. In an action on a warranty for the soundness of a horse, the measure of damages is the difference in the value of what the horse was warranted to be, and what it actually was at the time of the sale; and the jury cannot add interest from the date of the writ, or its equivalent. *Moulton v. Scruton*, xxxix. 287.

38. The general rule would seem to be, that the jury cannot allow interest in actions for unliquidated and contested claims, sounding in damages; but it is within the discretion of a jury to give interest, in such cases, in the name of damages. *APPLETON, J.*, non-concurring. *Moulton v. Scruton*, xxxix. 287.

39. In actions *ex delicto*, all damages must be the result of the injury complained of. *Worcester v. G. F. M. Co.*, xli. 159.

40. Hence a party cannot recover damages for being deprived of the use of his real estate, so that he could not appropriate it for an imaginary purpose, for which he did not design to use it. *Worcester v. G. F. M. Co.*, xli. 159.

See ACTION, 17.

## II. IN ACTIONS ON CONTRACTS.

- (a) ON SIMPLE CONTRACTS.
- (b) ON COVENANTS REAL.
- (c) ON OTHER COVENANTS AND BONDS.

### (a) *On simple contracts.*

41. Where the plaintiff, "being about to set up a steam engine and planing machine, agreed with the defendant—a house carpenter—to take charge of, and oversee the work, (which was making drums, machinery and other gearing necessary to connect them,) and to receive one dollar and fifty cents per day for his services; and where he so worked there, until he pronounced the machinery to be in running order, and then left:—*Held*, that the defendant was not thereby bound by a special agreement to do the work in any manner; and that the defendant was entitled to be paid for his own labor. *Haskell v. Sawyer*, xxvii. 234.

42. Usually, the damages recoverable at law are limited to the natural and proximate consequences of the act complained of. *Furlong v. Polleys*, xxx. 491. *Bridges v. Stickeney*, xxxviii. 361.

43. If the damages sustained are not the necessary consequence of it, they can be recovered only when specially set forth in the declaration. *Furlong v. Polleys*, xxx. 491.

44. The measure of damages for the neglect or refusal to deliver goods, purchased or agreed for, is determined by law to be the difference between the price paid or agreed to be paid, and the market price of the like goods at the time and place of delivery. *Furlong v. Polleys*, xxx. 491.

45. The essence of the rule being to place the party injured in the same situation, by allowing him to supply himself, as he would have been, if the goods had been delivered. *Furlong v. Polleys*, xxx. 491.

46. Thus, where hay of a certain quality, and at a fixed price, paid by note, was to be delivered in the forest, for lumbering operations, and on a specified day; and hay was furnished, but it was deficient in quality, and was not accepted:—*Held*, the measure of damages to be the difference between the price paid by the note, and the market price of the agreed sort of hay, at

the nearest and most suitable place where it could be purchased, together with the necessary cost of transportation therefrom. *Furlong v. Polleys*, xxx. 491.

47. When parties each have a real, though distinct interest in an enterprize, and one agrees to pay the other a proportion of the expenses incurred by the other in sending a number of men to a distant point to protect the enterprize, "and all expenses in connection therewith;" the wages and expenses of the men, while returning, (if they return immediately after having performed the service,) are within the contract. And the plaintiff's liability to pay, is a sufficient ground of action against the defendant. *Dwinel v. Barnard*, xxxii. 116.

48. When a party has obligated himself to receive a deed of land and pay therefor a stipulated sum, and the deed, though refused, was duly tendered and placed in a position to await the call of the obligor, the damage to be recovered, is the contract price and interest. *Oatman v. Walker*, xxxiii. 67.

49. Where one had contracted to labor in the service of another, during a given time, at a specified rate of wages, he is entitled to recover all the damage he has sustained, by having been discharged by his employer, before the expiration of the time, without justifiable cause. *Miller v. Goddard*, xxxiv. 102.

50. One, holding a guaranty against the arrest of his person, cannot recover upon the guaranty, after having been arrested, any of the costs or expenses, arising subsequently to the arrest. HOWARD, J., dissenting. *Wing v. Chase*, xxxv. 260.

51. Upon the erection of a building under a special contract, the contractor, though he may have departed from the contract, yet if the building have been accepted, is entitled to recover for the labor and materials at the contract price, deducting so much as they are worth less on account of the departures. *White v. Oliver*, xxxvi. 92.

52. Where a sealed lease of land was obtained by false and fraudulent representations, and the lessee, after having discovered the fraud, did not rescind the contract, but continued to occupy the land, in an action by the lessor against the lessee:—*Held*, that the amount of damages occasioned to the lessee by the fraud may be deducted from the amount of the rent. *Herrin v. Libbey*, xxxvi. 350.

53. Where the defendant contracted for a quantity of joists, and received them without objection, at his own survey, he is bound to pay the price agreed, although they were not surveyed by any sworn surveyor. *Abbott v. Goodwin*, xxxvii. 203.

54. Where a seaman agreed in writing, with the owners and skipper of a fishing vessel, that he should have his share of one half of the fish, for his services for the season, he is not entitled to any portion of the bounty earned by the vessel. *Jeffrey v. Grant*, xxxvii. 236.

55. Where, in consideration of a sum advanced to defendant, he agreed to go to the gold diggings of California, and give the plaintiff one half of the proceeds of labor there for one year, no deductions are to be made from such proceeds, by reason of expenses paid for sickness during the year. *Staples v. Wheeler*, xxxviii. 372.

56. Where the plaintiff had contracted to labor in the service of another, during a given time, at a specified rate of wages, he is entitled to recover the value of his services, not exceeding the contract price, if, before his time expired, he was rightfully discharged on account of his bad conduct. *Lawrence v. Gullifer*, xxxviii. 532.

57. And, in such case, he will not be liable for any damages the other party may suffer by employing another. *Lawrence v. Gullifer*, xxxviii. 532.

58. In an action on a warranty for the soundness of a horse, the measure of damages is the difference in value of what the horse was warranted to be, and what it actually was, at the time of the sale. *Moulton v. Scruton*, xxxix. 287.

59. The general rule would seem to be, that it is not in conformity with legal principles, to allow interest in actions for unliquidated and contested claims, sounding in damages; but it is within the discretion of a jury to give interest in such cases in the name of damages. *Moulton v. Scruton*, xxxix. 287.

60. Where a railroad company agreed to pay a contractor ninety per cent. monthly, of the estimated amount of the work done and materials procured, in the construction of their road, under the report of their engineer, and authorized the engineer to declare the contract abandoned, and any sum due the contractor to be forfeited to the company, whenever he should show that the covenants of the contractor were not performed:—*Held*, that where the engineer had put an end to such contract, it did not operate to discharge the company from the payment of the ninety per cent. found to be due from them, prior to such determination. *Richer v. Fairbanks*, xl. 43.

61. The defendant agreed to purchase a cargo of southern pine lumber, at a certain price per M., and pay the freight. When it was delivered, he refused to pay the freight; and the plaintiffs told him, that if he took it, he should pay \$40 per M., unless he paid the freight:—*Held*, that defendant repudiated the contract, by his refusal; and by keeping the lumber, he was chargeable for it at the price fixed by plaintiffs. *Patten v. Hood*, xl. 457.

See ATTACHMENT, 69.

BILLS, &c., 22.

#### (b) *On covenants real.*

62. Upon the breach of the covenant of warranty in a deed of land, where the grantor was seized when he conveyed, and the grantee entered, and continued in possession until evicted, the measure of damages is the value of the premises, at the time of the eviction, with interest, and the expenses reasonably and actually incurred in the defence of the former suit, and the value of improvements, made since the conveyance. *Hardy v. Nelson*, xxvii. 525. *Elder v. True*, xxxii. 104.

63. Upon a breach of the covenant against incumbrances, the covenantee is entitled to recover against the covenantor, the amount paid in discharging the incumbrance. *Cole v. Lee*, xxx. 392. *Reed v. Pierce*, xxxvi. 455.

64. Upon a breach of the covenant against incumbrances, if the plaintiff has not been evicted, or has not removed the incumbrance, he can recover nominal damages only. *Copeland v. Copeland*, xxx. 446. *Stowell v. Bennett*, xxxiv. 422. *Reed v. Pierce*, xxxvi. 455.

65. Upon a breach of the covenant against incumbrances, nominal damages only will be recovered, unless the incumbrance have been discharged, although the plaintiff has yielded to an entry and possession by the incumbrancer. *Stowell v. Bennett*, xxxiv. 422.

(c) *On other covenants and bonds.*

66. In a suit upon a poor debtor's bond, since the Act of 1842, c. 31, was in force, if the condition has not been performed, the damages are to be assessed by the Court, and not by the jury. *Call v. Barker*, xxvii. 97.

67. Where a law question, in a suit upon a poor debtor's bond, was pending, at the time that the Act of 1848, c. 85, went into effect, arising on an agreed statement of facts, the Court will give an opportunity for the defendant to have the damages estimated by a jury, if the condition of the bond be forfeited. *Robinson v. Barker*, xxviii. 310.

68. If the condition of a poor debtor's bond be broken, and he has taken the oath under Act of 1848, c. 85, § 2, the amount of damages would be estimated by the ability of the debtor to have made payment of the debt, or some portion of it. *Call v. Barker*, xxviii. 317. *Bard v. Wood*, xxx. 155.

69. In such case, the actual damage is the loss suffered by the non-performance of the condition of the bond, and not the damages occasioned by the particular cause which produced a breach of the condition. *Call v. Barker*, xxviii. 317. *Torrey v. Berry*, xxxvi. 589.

70. In all cases upon the breach of a poor debtor's bond, where the debtor has been permitted to take, and has taken, the oath prescribed in the 148th c. of R. S., of 1841, and whether the justices had jurisdiction or not, damages must be assessed according to the Act of 1848, c. 85, § 2. *Bard v. Wood*, xxx. 155. *Baker v. Carleton*, xxxii. 335. *Hathaway v. Stone*, xxxiii. 500. *Winsor v. Clark*, xxxvi. 110. *Torrey v. Berry*, xxxvi. 589. *Bray v. Kelley*, xxxviii. 595. *Houghton v. Lyford*, xxxix. 267. *Nash v. Babb*, xl. 126.

71. In an action upon the breach of a bond for the conveyance of real estate, the damages to be assessed, are the value of the land, at the time it should have been conveyed. *Russell v. Copeland*, xxx. 332.

72. In a suit for the breach of a bond, given to procure the release of a debtor from arrest on *mesne process*, the penal sum may be chancered to the amount of the actual damages. *Sargent v. Pomroy*, xxxiii. 388. *Clifford v. Kimball*, xxxix. 413.

73. In the absence of proof upon the point, the sum due on the execution recovered in the suit, will be considered the actual damage. *Sargent v. Pomroy*, xxxiii. 388.

74. That rule will not be varied by proof that the debtor was without attachable property at a period several months later than the breach of the bond. *Sargent v. Pomroy*, xxxiii. 388.

75. In a suit upon a bond, conditioned to pay an outstanding mortgage upon land purchased by the obligee, commenced after a breach, the damage occurring during its pendency may be included in the judgment. *Gennings v. Norton*, xxxv. 308.

76. Where, in such a case, judgment upon the mortgage has been recovered against one to whom the obligee had conveyed a part of the land without covenants of warranty, and the obligee has paid the amount of the judgment: *Held*, that as such payment lifted the mortgage from his own part of the land as well as from that of the grantee, he may recover for the amount due on the mortgage; but not for the cost in that judgment, the payment of the same having been voluntary. *Gennings v. Norton*, xxxv. 308.

77. For necessary services rendered and expenses paid in defending a suit,

brought upon such mortgage against the obligee, he is entitled to recover compensation in his suit upon the bond. *Gennings v. Norton*, xxxv. 308.

78. Where, in an action of *tort*, the defendant, after having been arrested, was released upon giving bond to the plaintiff, in accordance with R. S. of 1841, c. 148, § 17; and, after judgment was recovered, he neglected to fulfill the conditions of the bond:—*Held*, that such bond was obligatory as a statute bond; and that the damages would be the amount of the judgment and costs of the action in which it was given, with interest thereon. *Richards v. Morse*, xxxvi. 240.

79. A joint relief bond, given by two or more execution-debtors, as principals, is not a statute bond, but is good at common law, if voluntarily given. And where, in an action upon such a bond, one of the principals had been discharged upon taking the poor debtors' oath, and the other was proved to be without property, judgment was rendered for the penalty of the bond and full costs, and execution issued for one cent, as damages. *Hatch v. Norris*, xxxvi. 419.

80. Upon an action for breach of a poor debtor's bond, for not delivering property disclosed, the obligee is entitled to recover the real and actual damage upon all the evidence submitted, though no evidence is offered of the value of the property disclosed. *Torrey v. Berry*, xxxvi. 419. *Nash v. Babb*, xl. 126.

81. Where the plaintiff had sold to the defendant certain shares in a bank, and took his covenant against loss or damage on account of having once owned them; and, when the charter was repealed, he was appointed, and acted as, one of the receivers of the bank; and, in a suit against the bank, after such appointment, he had wrongfully agreed to a judgment against the bank, upon which judgment his own property was taken in part satisfaction for having owned such shares:—*Held*, that for all expenses by him incurred in obtaining a reversal of such judgment, and expenses and time in defending judicial proceedings growing out of such illegal judgment, he cannot recover. *Merrill v. Shaw*, xxxviii. 267.

82. Damages, in such case, are limited to such liabilities as legitimately grow out of his capacity as a stockholder. *Merrill v. Shaw*, xxxviii. 267.

83. In a suit upon a bond, given under § 17, of c. 148, of R. S. of 1841, damages are to be assessed by the Court, and not by the jury, and the amount is the actual damages sustained. *Clifford v. Kimball*, xxxix. 413.

84. No allegation of a fraudulent concealment of property, in such case, whereby the debtor would be prevented from taking the statute oath, will entitle the obligee to a hearing before the jury. Neither will Art. 1, § 20, of the constitution, give any such right. *Clifford v. Kimball*, xxxix. 413.

85. In a suit on a bond, stipulating that defendant will not engage in the business of iron casting, within a certain distance of a certain place, for a fixed time, damages, which were sustained after the date of the writ, and up to the time of trial, are recoverable. *Whitney v. Slayton*, xl. 224.

86. If the oath be not administered to a poor debtor before a breach of the conditions of the bond, the plaintiff will be entitled, as damages, to the whole amount due on his execution, with interest and costs. *Newton v. Newbegin*, xliii. 293.

See BOND, 35, 37, 38, 41.



## III. UNDER STATUTES.

87. On complaint to recover damage for injury done to plaintiff's land, by flowing the same for the support of mills, the jury may include compensation for the injury done to the plaintiff's fences, and for the annual expense of maintaining fences for the future. *Jones v. Phillips*, xxx. 455.

88. Under the Act of 1848, c. 71, § 2, if an officer "shall detain any offender, without warrant, longer than such time as was necessary to procure a legal warrant, such officer shall be liable to pay all such damages as the person detained shall suffer thereby. *Burke v. Bell*, xxxvi. 317.

89. On complaint for flowing land, damages can only be awarded for the effects of the dam described in the complaint. And damages, arising from other dams, although auxiliary to the one complained of, cannot be considered by the jury. *Underwood v. N. W. S. Co.*, xxxviii. 75.

90. By R. S. of 1841, c. 154, § 23, every master of a vessel, who shall knowingly transport out of the State, any person under the age of twenty-one years, without the consent of his parent, master and guardian, &c., shall be liable to such parent, &c., for all damages sustained, in an action on the case. *Nickerson v. Harriman*, xxxviii. 277.

91. No vindictive damages are contemplated by said statute, but the measure of damages is compensation for the pecuniary injury or loss resulting from such transportation. And it is for the direct consequences of his own act, and not for the act of God, that such master is responsible. *Nickerson v. Harriman*, xxxviii. 277.

92. Thus, if the minor, who is transported, dies at the termination of the outward voyage, no damages can be recovered by his father, of the master, for the loss of his son's services, *after* his death. *Nickerson v. Harriman*, xxxviii. 277.

See DOWER, 57.

MILLS, 70,-75.

## DEBT.

An action of debt can be maintained on a recognizance, taken in the District Court, conditioned to enter and prosecute an appeal to this Court, on a failure to perform the condition. *Longley v. Vose*, xxvii. 179.

See ACTION, 38.

AMENDMENT, 7.

## DEBTOR AND CREDITOR.

See FRAUD AND FRAUDULENT CONVEYANCES. POOR DEBTORS.

## DECLARATION.

See AMENDMENT, 6-19. WRITS.

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## DECLARATIONS.

See EVIDENCE, 321-346.

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## DEDICATION.

See WAYS.

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## DEED.

- I. PARTIES.
  - II. EXECUTION, DELIVERY AND ACCEPTANCE.
  - III. ACKNOWLEDGMENT AND REGISTRATION.
  - IV. WANT OF TITLE, AND ERRORS IN DEEDS.
  - V. VALIDITY AND EFFICACY.
  - VI. CONSTRUCTION.
- 

## I. PARTIES.

- (a) DEEDS MADE BY AGENTS, OR UNDER AUTHORITY OF LAW.
- (b) PARTIES GENERALLY, AND THEIR DUTIES.

(a) *Deeds made by agents, or under authority of law.*

1. Where a power of attorney has been given, authorizing the conveyance of land, verbal directions from the constituent to the attorney can confer no new authority, nor enlarge that contained in the power of attorney. *Spofford v. Hobbs*, xxix. 148.

2. A ratification by the proprietor of land, of an unauthorized conveyance by an attorney, must be by an instrument under seal, in order to be effectual. *Spofford v. Hobbs*, xxix. 148.

3. The taking back a mortgage and notes by the proprietor, the mortgage not referring specifically to the deed, and not containing any thing inconsistent with the attorney's want of authority, is not a ratification. *Spofford v. Hobbs*, xxix. 148.

4. Where one holding office, has authority, in the exercise of such office, to convey real estate for the benefit of others, his deed is void, if it purport to have been executed, not in the exercise of that office, but of some other office. *Warren v. Stetson*, xxx. 231.

5. Where the selectmen, treasurer and clerk of a town are authorized to convey the ministerial and school lands, it is essential that the clerk, as a distinct branch of the board, should join in the deed. *Warren v. Stetson*, xxx. 231.

6. A conveyance of land by an administrator, under a license from the Probate Court, after the time limited by law for the operation of the license, is void. *Chadbourne v. Rackliff*, xxx. 354.

7. Where executors have power to sell real estate, coupled with an interest in trust, a conveyance by survivors or by those who alone accept the trust, will be good. *Put. F. School v. Fisher*, xxx. 523.

8. A conveyance by a devisee under a foreign will, made before the will is filed and recorded in this State, is nevertheless good, as his title commences upon the death of the testator. *Put. F. School v. Fisher*, xxx. 523.

8. By R. S. of 1841, c. 91, § 14, "all deeds and contracts, executed by an authorized agent for an individual or corporation, either in the name of the principal, by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal." *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

(b) *Parties generally, and their duties.*

9. One claiming title under a deed from a corporation, executed by its agent, must prove that the corporation, by a legal vote, had authorized such person to make the conveyance. *Miller v. Ewer*, xxvii. 509.

10. A husband may lawfully convey the freehold, which he takes by his marriage, in the lands of his wife. *Trask v. Patterson*, xxix. 499.

11. A creditor to whom the debtor has made a conveyance of land, absolute in its terms, is not bound to account for its value toward the debt, if, at the time of the conveyance, it was intended as collateral security. *Whitney v. Batchelder*, xxxii. 313.

12. The common law, that a disseizee of land cannot convey, has been abrogated by R. S. of 1841, c. 91, § 1; by which provision, a disseizee may convey, if he have a right of entry. *Pratt v. Pierce*, xxxvi. 448. *Buck v. Babcock*, xxxvi. 491.

## II. EXECUTION, DELIVERY AND ACCEPTANCE.

13. To constitute an effective delivery of a deed, it must have come into the possession of the grantee, with the consent of the grantor as a conveyance. *Rhodes v. Gardiner*, xxx. 110.

14. If a deed be placed in the hands of the grantee, not for the purpose of having it take effect as a deed, but for some other purpose, it is no delivery, and no title will be conveyed. *Rhodes v. Gardiner*, xxx. 110.

15. A committee of three was appointed by a school district to procure a deed of land. The deed was made and deposited with one of the committee, with directions to deliver it upon payment of a certain sum of money. The held received the deed, and voted to accept it, but made no payment:—*Held*, the deed was not delivered. *Rhodes v. Gardiner*, xxx. 110.

16. The day upon which a deed is delivered, may be properly referred to, as the day of its date. *Oatman v. Walker*, xxxiii. 67.

17. The date of a deed is not intended to express the hour and minute, when it was executed; but rather the time of its delivery. *Oatman v. Walker*, xxxiii. 67.

18. In order to transfer the title of land by deed, it is essential that the deed be expressly or impliedly accepted by the grantee. *Dwinal v. Holmes*, xxxiii. 172.

19. The tender of a deed, and continued readiness to deliver it, by one who had given a bond to convey it, will transfer no title, although the grantee had paid for it, and occupied it nineteen years. *Dwinal v. Holmes*, xxxiii. 172.

20. A deed has no effect until its delivery. The date is *prima facie* evidence, that it was then delivered; but the actual time of delivery may be proved by parol. *Sweetser v. Lowell*, xxxiii. 446.

21. It may be presumed, notwithstanding the form of words as to the attestation, that deeds were in fact delivered on the day they were acknowledged, and in such order of time as to make them effectual to carry out the intention of the parties. *Loomis v. Pingree*, xliii. 299.

### III. ACKNOWLEDGMENT AND REGISTRATION.

22. The record of a deed, or deed itself, left in the registry for record, was the only legal notice by registry of the conveyance of real estate, recognized by our statutes, prior to the enactment of the R. S. of 1841, c. 91, § 25. *Stevens v. Bachelder*, xxviii. 218.

23. If, therefore, the deed or levy was left with the register, and he made a certificate thereon, that it had been recorded, and it was then withdrawn and taken from the office by the grantee or creditor before any record thereof was actually made, it furnishes no legal notice to subsequent purchasers or creditors of such conveyance. *Stevens v. Bachelder*, xxviii. 218.

24. The record of the return of an officer of a levy of an execution on real estate, without his signature to the return, is not such a record as the statute requires against subsequent purchasers. *Stevens v. Bachelder*, xxviii. 218.

25. R. S. of 1841, c. 91, § 26, has abrogated the law by which implied or constructive notice of a prior unregistered deed would avoid a subsequent one from the same grantor. The grantee, in the subsequent deed, must have "actual notice," of the prior one, otherwise his title is valid. *Spofford v. Weston*, xxix. 140. *Hanley v. Morse*, xxxii. 287.

26. The registry of a deed, from one stranger to another, does not indicate that the grantor in said deed had a conveyance from the actual owner, no such deed appearing on the record; nor can any information, derived by the grantee from those who obtained their knowledge from such registry, have such effect. *Spofford v. Weston*, xxix. 140.

27. It is for the party relying on an unregistered deed, against a subsequent purchaser, or attaching creditor, to prove that the latter had actual knowledge or notice of such deed. He is not bound to inquire. *Spofford v. Weston*, xxix. 140.

28. Where the declarations of a subsequent purchaser indicate his disbelief that any prior deed had been given by his grantor, although admitting his knowledge of a claim that such deed existed, by those who professed to hold under it, there can arise no presumption that he had actual notice of the existence of such deed. *Spofford v. Weston*, xxix. 140.

29. A bond for a re-conveyance of land, upon the performance of conditions, though unrecorded, will be effectual as against the grantor's creditors who attached prior to R. S. of 1841, and who, at the time of the attachment, had notice, either expressed or implied, of such a bond. *McLaughlin v. Shepherd*, xxxii. 143.

30. An attaching creditor is chargeable with notice in the same manner and with the same effect, as a subsequent purchaser. *McLaughlin v. Shepherd*, xxxii. 143.

31. Prior to R. S. of 1841, c. 91, § 26, a visible possession of land under a deed, though unrecorded, was constructive notice of title, and equivalent to registration. *Hanley v. Morse*, xxxii. 287.

32. This rule of constructive notice is still in force, as to deeds made prior to R. S. of 1841, even against conveyances made since. TENNEY, J., dissenting. *Hanley v. Morse*, xxxii. 287.

33. And the possession of the representatives of the grantee of such unrecorded deed, whether as tenants, grantees, or heirs, has the same effect upon a subsequent conveyance, as if he were personally in possession, when such subsequent grant was made. *Hanley v. Morse*, xxxii. 287.

34. The deeds of defeasance required to be recorded by R. S. of 1841, c. 91, § 27, are such as operate upon the title, and not such as operate only upon covenants, upon which personal actions may be maintained. *Littlefield v. Getchell*, xxxii. 390.

35. A deed of land, though not acknowledged or recorded, conveys the title as against the grantor and his heirs. *Buck v. Babcock*, xxxvi. 491.

36. By R. S. of 1841, c. 91, before a deed can be recorded, it must be acknowledged before a justice of the peace, and his certificate of that fact indorsed thereon. *Brown v. Lunt*, xxxvii. 423.

37. Without this pre-requisite, the record of it is unauthorized, and is not notice of a conveyance of the land. *Brown v. Lunt*, xxxvii. 423.

38. But such certificate, if made by a justice of the peace, *de facto*, merely, is sufficient. *Brown v. Lunt*, xxxvii. 423.

39. Where a deed was acknowledged before one who had held commissions of justice of the peace, for a long series of years, but, at the time of such acknowledgment, his last commission had expired, but without his knowledge; and he had constantly and frequently acted as a justice of the peace, after his commission had expired, until after he took said acknowledgment, believing that he was a justice of the peace; and the parties to the deed well knew that he so acted:—*Held*, that such acknowledgment was good. *Brown v. Lunt*, xxxvii. 423.

40. The official acts of such justice, within the jurisdiction of a justice of the peace *de facto*, are valid, as they affect third parties, and cannot be inquired into collaterally. *Brown v. Lunt*, xxxvii. 423.

41. Where one, in possession, conveys premises, and declares in his deed that "the said land is under an incumbrance of \$200, and interest from September last," and furthermore informs the grantee, that they were under an incumbrance to J. L., which would be payable in September next, and interest:—*Held*, that this was sufficient notice to give effect, as against said grantee, to the prior unrecorded deed to J. L. *Merrill v. Ireland*, xl. 569.

42. And where such grantee, not being in possession, assigned the deed to the demandant, and, in fact, he was acting for him in the negotiation, the de-

mandant can claim no rights as against the unrecorded deed. *Merrill v. Ireland*, XL. 569.

43. Notice of a prior conveyance should be so express and satisfactory to the party, that it would be a fraud in him subsequently to purchase, attach, or levy upon the land to the prejudice of the first grantee. R. S. of 1841, c. 91, § 26, controls the construction, that the possession of the grantee alone, if open, continued and exclusive, would be sufficient inference in law of notice. *Porter v. Sevey*, XLIII. 519. *Goodwin v. Cloudman*, XLIII. 577.

44. The evidence, from all the circumstances, must be such as to give the jury reasonable satisfaction, that the second purchaser had notice of the prior deed, before he purchased. *Porter v. Sevey*, XLIII. 519. *Goodwin v. Cloudman*, XLIII. 577.

#### IV. WANT OF TITLE, AND ERRORS, IN DEEDS.

45. Where, upon a purchase of real estate by a quitclaim deed, both parties suppose the title to be good, a failure in the title, of itself, will not entitle the vendee to reclaim the purchase money. *Butman v. Huzzey*, xxx. 263. *Bullen v. Arnold*, xxxi. 583.

46. Relief is not given in equity, even in cases of mistake falling within its rules, when the party seeking it could have discovered the fact which caused the injury, by reasonable diligence. *Butman v. Huzzey*, xxx. 263.

47. A deed of land will not be reformed, (upon a bill in equity,) for a mistake in its boundaries, to the injury of one who has purchased of the grantee in good faith, and without notice of the mistake. *Whitman v. Weston*, xxx. 285.

#### V. VALIDITY AND EFFICACY.

48. It is not indispensable that the officer's deed, of an equity of redeeming real estate, should be made, executed and delivered on the day of sale. If made so soon afterwards, that the whole proceedings will vest a title in the purchaser, the deed and the purchaser's right under it will have relation back and take effect from the time of the sale. *Abbott v. Sturtevant*, xxx. 40.

49. Where one holding office, has authority, in the exercise of such office, to convey real estate for the benefit of others, his deed is void, if it purport to have been executed, not in the exercise of that office, but of some other office. *Warren v. Stetson*, xxx. 231.

50. Where the selectmen, treasurer and clerk of a town are authorized to convey the ministerial and school lands, it is essential that the clerk, as a distinct branch of the board, should join in the deed. *Warren v. Stetson*, xxx. 231.

51. A conveyance of land by an administrator, under a license from the Probate Court, after the time limited by law for the operation of the license, is void. *Chadbourne v. Rackliff*, xxx. 354.

52. Where executors of a will have power to sell real estate, coupled with an interest in trust, a conveyance by the survivors, or by those who alone accept the trust, is valid. *Put. F. S. v. Fisher*, xxx. 523.

53. A conveyance by a devisee under a foreign will, made before the will

is filed and recorded in this State, is valid, as his title commences upon the death of the testator. *Put. F. S. v. Fisher*, xxx. 523.

54. The obtaining of a conveyance of land, upon a verbal promise that the purchaser would subsequently secure the purchase money by a mortgage, and a refusal afterwards to give such mortgage, do not constitute sufficient ground for enjoining the purchaser from selling the land, unless some fraudulent or deceptive practice was used to obtain the conveyance. *Ellsworth v. Starbird*, xxxii. 176.

55. A bargain and sale of a fee-simple estate, to take effect *in futuro*, is inoperative and void. *Marden v. Chase*, xxxii. 329.

56. That result, however, is not to be admitted, if it can be prevented by a construction, which will carry into effect the intention of the parties, and that their designs shall not be defeated. *Marden v. Chase*, xxxii. 329.

57. A deed, showing that the grantor lived upon the land, and reserving "the use, occupation and control of it, during the lives of the grantor and his wife, for their support and maintenance," is not void as creating a fee to take effect *in futuro*. *Marden v. Chase*, xxxii. 329.

58. Fraud, in the procurement of a deed of land, can be established only upon proof, that the grantee or his agent performed some act or made some representation which was deceptive or false, knowing it to be so. *Larrabee v. Larrabee*, xxxiv. 477.

59. A deed, conveying land, may be valid between the parties to it, without consideration. *Larrabee v. Larrabee*, xxxiv. 477.

60. An agreement, made by the devisee of the reversion, that he would assent to the disallowance of the will by the Judge of Probate, and would withdraw the testimony already laid before the Judge in support of it, is a sufficient consideration, (if it need any,) for a grant, by an heir at law, of a reversionary interest in land, authorizing the grantee to take possession at the termination of the life estate. *Larrabee v. Larrabee*, xxxiv. 477.

61. A conveyance of land to a married woman, in consideration of her promissory note for the purchase money, is without consideration, and, as to the then existing creditors of the grant, void. *Howe v. Wildes*, xxxiv. 566. *Brown v. Lunt*, xxxvii. 423. *Newbegin v. Langley*, xxxix. 200.

62. As against such creditors, the punctual payment of such note cannot impart any new vitality or strength to such conveyance. *Howe v. Wildes*, xxxiv. 566.

63. The common law doctrine, that a disseizee of land cannot convey, has been abrogated by R. S. of 1841, c. 91, § 1; by which, he may convey, if he have the right of entry. *Pratt v. Pierce*, xxxvi. 448. *Buck v. Babcock*, xxxvi. 491.

64. If the notes, given by a married woman for a conveyance of land to her, be indorsed by her husband, the deed is valid, although the indorsement was after the conveyance, if made in pursuance of an agreement when the deed was executed. *Brown v. Lunt*, xxxvii. 423.

65. Where C. conveyed to G. land, and G. took the deed for the purpose of obtaining security, for what was due him; but nothing was paid therefor, and no security surrendered or discharged; and where the creditors of C. attached his real estate, and were informed by G. that he had no claim upon it, and was subsequently appointed and acted as an appraiser for one of the creditors; and where G. afterwards levied his execution upon the land embraced in the deed:—*Held*, that the conveyance was voluntary, and void as to creditors. *Wellington v. Fuller*, xxxviii. 61.

66. As a general rule, deeds of married women are void. *Newbegin v. Langley*, xxxix. 200.

67. A deed to a married woman and her note secured by a mortgage of the same premises to secure its payment, are void, together with the mortgage. *Newbegin v. Langley*, xxxix. 200.

68. Where several join in a deed, by signing, sealing and delivering the same, a subsequent insertion in the body of the deed, of the names of two who had executed it, but who were not present at the delivery, without the knowledge and consent of the parties, will not affect its validity as to those whose names were in the body of the deed as grantors. *Bird v. Bird*, xl. 398.

69. Whether any title from persons whose names are thus inserted, is passed; *quere*. *Bird v. Bird*, xl. 398.

70. To invalidate a deed at common law, on the ground of insanity of the grantor, an entire loss of the understanding must be shown. While a man is legally *compos mentis*, though of weak mind, he has the right of disposing of his property; and neither courts of law nor of equity will inquire into his wisdom, or want of it, in the disposition of it. *Hill v. Nash*, xli. 585.

## VI. CONSTRUCTION.

- (a) CONDITIONS, RESERVATIONS AND EXCEPTIONS.
- (b) BOUNDARIES.
- (c) GENERALLY.

### (a) *Conditions, Reservations and Exceptions.*

71. A conveyance of land upon condition, that unless the grantee should make certain payments, the deed shall be "void, so far as to make good any non-fulfilment of said conditions," will entitle the grantor to recover possession, after a breach of the condition, and to hold the property as a pledge or mortgage, until the condition be performed. *Fisk v. Chandler*, xxx. 79.

72. A deed, showing that the bargainor lived upon the land, and reserving the "use, occupation and control of it, during the lives of the grantor and his wife, for their support and maintenance," intends that the reservation should be restricted to the measure of relief which the grantor and wife might actually need for their support and maintenance. *Marden v. Chase*, xxxii. 329.

73. The following words, inserted at the close of the covenants in a warranty deed:—"Provided that the grantor shall pay to" A. "a note" [described] "signed by the grantee," are unmeaning and inoperative. *Abbott v. Pike*, xxxiii. 204.

74. In a conveyance of house lots, on a street, not yet made or accepted, but existing only upon a plan, the words with a "reserve of the street," may be construed as words of grant, when such was the obvious meaning of the parties. *Palmer v. Dougherty*, xxxiii. 502.

75. A right of re-entry for a breach of condition in a conveyance of land, pertains only to the grantor and his legal representatives. It is not included among the rights mentioned in R. S. of 1841, c. 94, § 1, and cannot be taken on execution. *Bangor v. Warren*, xxxiv. 324.

76. Every exception or reservation in deeds of conveyance are to be construed most strictly against the grantor, and most beneficially for the grantee. *Wyman v. Farrar*, xxxv. 64.



77. F. owned a water privilege and dam, by which the wheels of his tannery were worked. He conveyed part of the land, with a right to take water for machinery from his dam, reserving "sufficient water, at all times, to work" the tannery wheels, "as now used."—*Held*, that he reserved no more water than was actually used by the tannery, at the time when the deed was given. *Wyman v. Farrar*, xxxv. 64.

78. A condition in a deed, that a third person shall be allowed to have the use and occupation of it for life, if he shall request it, is a condition subsequent. And an entry, after breach of such condition, is indispensable to re-vest the estate. *Tallman v. Snow*, xxxv. 342.

79. A restriction may take effect as a reservation, if it do not necessarily deprive the grantee of essential benefits from the grant. *Gay v. Walker*, xxxvi. 54.

80. A reservation cannot be regarded as repugnant, if, notwithstanding it, the grantee acquire a valuable interest in the thing granted. *Gay v. Walker*, xxxvi. 54.

81. A grant to one, who already owns adjoining land, though it provide that the land granted shall remain "common and unoccupied," may nevertheless convey a valuable interest, by securing a right of passage, and a free flow of light and air to his other land, with an unobstructed prospect from it. *Gay v. Walker*, xxxvi. 54.

82. A right of way, reserved in a grant of land, is, by legal intendment, a new thing derived from the land, and is not repugnant to the grant. *Gay v. Walker*, xxxvi. 54.

83. A free flow of light and air to, or an unobstructed prospect from, the grantor's dwellinghouse, may be secured by a reservation in a grant made by him of adjoining land. *Gay v. Walker*, xxxvi. 54.

84. Thus, language requiring the granted land "to be common and unoccupied," may take effect as a valid reservation. *Gay v. Walker*, xxxvi. 54.

85. It is a general rule, in a conveyance of real estate on certain conditions, that any one interested in the conditions or in the land, may perform them. *Wilson v. Wilson*, xxxviii. 18.

86. A condition of a grant of land, that the grantee shall maintain and support in a comfortable manner the persons therein named, charges no personal trust upon him, and the support may be furnished by others. *Wilson v. Wilson*, xxxviii. 18.

87. In the deed of the Land Agent was this reservation:—"Reserving, however, to actual settlers thereon, the right to perfect their titles to such lands in the same manner as if this conveyance had not been made."—*Held*, that such reservation was designed only for those who had contracts in writing by which titles could be perfected. *Rogers v. McPheters*, xl. 114.

88. A manufacturing corporation conveyed certain property to A., "excepting and reserving the right, at all times, to take and use water sufficient to drive the factory and machinery attached," &c. Afterwards, the corporation conveyed to B., certain other real estate, with their factory, machinery, &c., in which conveyance, A. joined by separate deed. A. had attached, to the factory flume, spouts through which he drew water to run his own mills, which B. cut off:—*Held*, that the reservation in the deed to A., of the right, "at all times, to take and use water sufficient to drive the factory, and the machinery attached," as between the parties thereto, is as effectual to secure to the company the right reserved, together with the easement and servitude,

so as to charge the lands of A., as by a deed from the owner of the land to be charged, granting the same as appurtenant to other estate of the grantee. And especially when A. himself conveys by his own deed the whole interest reserved. *Hammond v. Woodman*, XLI. 177.

89. And if the attachment of spouts to the factory flume, disturbed the right of B. "at all times, to take and use water sufficient to drive the factory," &c., then he had authority to cut them off. *Hammond v. Woodman*, XLI. 177.

90. A reservation in a deed is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by deed, and derived from other sources. *Gay v. Walker*, XXXVI. 54. *Moulton v. Faught*, XLI. 298.

91. An exception in a deed is always a part of the thing granted and of a thing in being. *Winthrop v. Fairbanks*, XLI. 307. *State v. Wilson*, XLII. 9. *Brown v. Allen*, XLIII. 590.

92. A reservation is of a thing not in being, but is newly created out of lands and tenements demised. *Gay v. Walker*, XXXVI. 54. *Winthrop v. Fairbanks*, XLI. 307. *State v. Wilson*, XLII. 9.

93. But exception and reservation have often been used indiscriminately, and the difference between them is so obscure in many cases, that it has not been observed. That, which in terms, is a reservation in a deed, is often construed to be a good exception, in order that the object designed to be secured may not be lost. *Winthrop v. Fairbanks*, XLI. 307. *State v. Wilson*, XLII. 9.

94. When a reservation is construed to be an exception, no words of inheritance are necessary, in order that the rights reserved or excepted may go to the heirs or assigns of the grantor. *Winthrop v. Fairbanks*, XLI. 307. *Smith v. Ladd*, XLI. 314.

95. The words, "reserving forever, for myself, the privilege of passing with teams, &c., across the same in suitable places, to land I own to the south of the premises," confer the benefit of an exception in favor of the grantor, his heirs and assigns, as occupants of the remaining lands belonging to him, "south of the premises," the privilege reserved being appurtenant to such lands. *Winthrop v. Fairbanks*, XLI. 307.

96. In two deeds, made at different periods to one grantee, the following reservations were included, viz.:—In the first deed, "I do reserve a driftway from the county road, on to the east end of said lot, &c., and another driftway on to the west end of said lot, where it will best convene me;" and in the second deed, "I do reserve a county road across, &c., and a driftway from that county road to get on to the west end of said lot, in the most convenient place to accommodate me," &c.:—*Held*,—

That the reservation in each deed should be treated as an exception, and as appurtenant to that portion of the lot remaining to the grantor; and—

The right of way thus reserved was not limited to foot passengers, but extended to passage for teams and all such uses as might be convenient in the occupation and improvement of the land. *Smith v. Ladd*, XLI. 314.

98. A way had been laid out and used by the public for nearly twenty years, across the land of A., when he conveyed it to B. After the description in his deed, is the following language:—"reserving to the public the use of the way laid across the same, from the county road to the river:."—*Held*, that this saving clause applied to "the way" then in existence, and should be treated as an exception. *State v. Wilson*, XLII. 9.

99. A deed conveying the grantor's right, title, interest and estate, and excepting therefrom certain public lots, and two parcels, of a given number of acres, each parcel under mortgage to different individuals, conveys the interest in the grantors to the lands mortgaged, and also whatever right they had in the public lots; the exception being only an exception as to all legal incumbrances. *Loomis v. Pingree*, XLIII. 299.

(b) *Boundaries.*

100. Where land is described as containing two and an half acres of salt marsh, and as being within the following bounds, beginning at a corner by the beach, and running by a given line to a creek, and by the creek to a certain marsh, and then by the marsh to a ditch, and then by the ditch to the beach, and by the beach to the place begun at; the land granted adjoins the land washed by the waves of the sea, although the quantity of land within the boundaries may exceed that named in the deed, and may not be wholly salt marsh, and although the ditch may not extend the whole distance to the beach. *Littlefield v. Littlefield*, XXVIII. 180.

101. If fixed and permanent monuments are given for the boundary of land, whatever the kind or quality is described to be, such monuments must have the controlling effect. *Littlefield v. Littlefield*, XXVIII. 180. *Haynes v. Young*, XXXVI. 557. *Emery v. Fowler*, XXXVIII. 99. *Chandler v. McCard*, XXXVIII. 564. *Melcher v. Merryman*, XLI. 601.

102. The extent of line, described as running from a known bound, a specified number of rods, to a stake, is to be ascertained, in the absence of all satisfactory proof of the position of that stake in the earth, by measuring from the known boundary, the number of rods named in the deed. *Lincoln v. Edgecomb*, XXVIII. 275.

103. Where the same grantor conveys to each of two persons, a lot of land, limiting each to a certain number of rods from opposite known bounds, running in a direction to meet, if extended far enough; and by admeasurement the lots do not adjoin, when it appears from the same deeds that it was the intention that they should; a rule should be applied, which will divide the surplus, over the admeasurement named in the deeds, ascertained to exist, by actual admeasurement upon the earth, between the grantees, in proportion to the length of their respective lines as stated in their deeds. *Lincoln v. Edgecomb*, XXVIII. 275.

104. Certain upland was conveyed adjoining easterly upon a river where the tide ebbed and flowed, one of the side lines running at right angles with the river, and the other so as to leave the end toward the river of less extent than at the other end, the bank of the river, at that place, being convex, — "together with all the flats and water privileges adjoining to, being at and having the width of the easterly end of the said land, as bounded by the river aforesaid;" the extent and position of the flats are to be determined by drawing a straight line from the south-east and north-east corners of the land at high water mark, and extending lines from the ends of that line and at right angles with it from high to low water mark. *Ken. F. Co. v. Bradstreet*, XXVIII. 374.

105. Where a plan is made intending to delineate a previous survey, and there is a variance between the survey and the plan, and a conveyance is made, containing a reference to the plan, the grantee will hold according to the survey. *Williams v. Spaulding*, XXIX. 112.

106. Where a tract of land is bounded "partly on a stream, as the said lot was surveyed by L. L., reference being had to the plan," and the plan shows a straight line along the stream, but crossing the stream at a curvature, and embracing land on the other side, and within the curvature of the stream; and the lines named in the deed do not entirely surround the tract; but the straight line does:—*Held*, that the straight line is the true boundary. *Eaton v. Knapp*, xxix. 120.

107. Where land is conveyed according to a plan, to which reference is made in the conveyance, it becomes a part of it; and if the plan bounds the lot by a fresh water stream, the lot extends to the centre of the stream. *Lincoln v. Wilder*, xxix. 169. *Pike v. Munroe*, xxxvi. 309.

108. Where two monuments are referred to in a deed, incompatible with each other, that which is the more certain and the more prominent must prevail over the other. *Lincoln v. Wilder*, xxix. 169.

109. Thus, where the shore and a plan are referred to, and are incompatible, the plan will be considered the more certain, and will control. *Lincoln v. Wilder*, xxix. 169.

110. A tract was wider at that end bounded on a river, than on the other. The north half was conveyed, separated from the other half by a line beginning at the river and running to the back end of the lot, "holding its width equally alike," the whole length of the farm:—*Held*, that the grantee was entitled to a strip of equal width throughout; and that its width, at the river, must be so much less than one-half the width at that end as to give to each of the parties an equal number of acres. *Patterson v. Trask*, xxx. 28.

111. In a conveyance of land, bounded on a fresh water pond, which had been permanently enlarged by means of a dam at its mouth, the title extends to the low water mark of the pond, in its enlarged state. *Wood v. Kelley*, xxx. 47.

112. If land, lying between certain boundaries, is conveyed to grantees in severalty, by distances, and in different proportions, without intermediate monuments or other means of ascertaining the location, and the distances do not correspond with those named in the deeds, they will hold in proportion to their respective grants, whether there be an excess or deficiency in the distance. *Mosher v. Berry*, xxx. 83.

113. A deed of land will not be reformed by bill in equity, for a mistake in its boundaries, to the injury of one who has purchased of the grantee in good faith, and without notice of the mistake. *Whitman v. Weston*, xxx. 285.

114. A lot of land was included in a deed to defendant's grantor, by mistake in the description of the boundaries, and the defendant purchased the same in good faith and without notice of the mistake:—*Held*, the equity would not disturb his title, although plaintiff was in possession when defendant purchased. *Whitman v. Weston*, xxx. 285.

115. A grantor of land, bounded on a street, according to a plan, retains the fee in the soil upon which the street is represented in the plan. *Sutherland v. Jackson*, xxx. 462. *Sutherland v. Jackson*, xxxii. 80. *Bangor House v. Brown*, xxxiii. 309.

116. The north line of B. and D.'s land is one hundred rods and six inches north from the public road. A levy, described to lie north of B. and D.'s land, and commencing at a tree eighty-five and one-half rods north from the road; thence northwardly seventy-two and one-half rods; thence east four

rods; thence south seventy-two and one-half rods to the north-east corner of B. and D.'s land; thence west on their north line to said tree; which tree was not found:—*Held*, that the south line of the levy is at B. and D.'s north line. *Alden v. Noonan*, xxxii. 113.

117. In determining the boundaries of land conveyed by deed, if any of the abutments or calls of the deed are found, they cannot be disregarded, although the others may not be found. *Talbot v. Copeland*, xxxii. 251.

118. Those which are found, if not inconsistent with each other, are elements in the rights of the parties, and cannot be departed from to substitute courses and distances. *Talbot v. Copeland*, xxxii. 251.

119. If a proprietor of land grant the right of a private way across it, of a specified direction and width, and afterwards convey the land on one side of such way, bounding it by the line of the way;—*it seems*, the grantee of such land takes no fee in any part of the land covered by the way; nor, by virtue of his deed, does he take any easement or right of way, in such land, by necessity. *State v. Clements*, xxxii. 279.

120. A true and certain description in a grant of land, is not invalidated by the insertion of a falsity in the description, when, by rejecting the erroneous part, the conveyance can be supported, according to the intention of the parties. *Abbott v. Pike*, xxxiii. 204.

121. A deed, by its description, conveyed lot No. 3, "being the same farm that P. W. now lives on." In fact, the farm occupied by P. W. was on lot No. 1:—*Held*, that the description by the number of the lot, was less certain than that by the word farm; and that the farm, (and not No. 3,) passed by the deed. *Abbott v. Pike*, xxxiii. 204.

122. When land is conveyed as bounded by a street, represented on a plan, but not made, the soil of the contemplated street, though owned by the grantor, does not pass. *Palmer v. Dougherty*, xxxiii. 502.

123. But if he bound the grant by a highway, generally, it will carry the fee *ad medium filum viæ*, if his title extended so far. *Palmer v. Dougherty*, xxxiii. 502. *Hunt v. Rich*, xxxviii. 195.

124. The purchaser of upland, adjoining navigable tide waters, takes the shore to low water mark, where the ebb and flow of the sea does not extend more than one hundred rods. *Winslow v. Patten*, xxxiv. 25. *Pike v. Munroe*, xxxvi. 309.

125. A grantor conveyed a square of land, bounded by an arm of the sea, "reserving a street through the square, [of a described width and location,] together with the flats, viz.; "all my right to the same, in front of said square, to the channel:"—*Held*, that the flats were not included in the reservation, but passed by the deed. *Winslow v. Patten*, xxxiv. 25.

126. Where one purchased land, bounded on the east by land of L., and on the south by land of D., and the land of L. extended a part only of the distance to D's land, but the course of L's line, if continued, would strike D's land:—*Held*, that the land is bounded on that continuation-line. *Ricker v. Barry*, xxxiv. 116.

127. If boundary descriptions disagree, and one of them is expressed as being certain and the other as uncertain, the former must prevail, in the absence of controlling circumstances. *Ricker v. Barry*, xxxiv. 116.

128. In the construction of such a deed, however, a long occupation, pursuant to the uncertainly expressed boundary, would have much influence. *Ricker v. Barry*, xxxiv. 116.

129. In the construction of deeds, the course is not always to be regarded as more satisfactory than the distance. *Ricker v. Barry*, xxxiv. 116.

130. Where land is conveyed, to be afterwards located within specified limits, the first rightful location on the earth, determines forever its bounds. *Farrar v. Cooper*, xxxiv. 394. *Hall v. Pickering*, xl. 548.

131. Though the lease of a factory, usually moved by water power, should not contain, in express terms, a grant of the water power, such grant would result by implication of law. But it will not extend beyond the lessors' rights. *Wyman v. Farrar*, xxxv. 64.

132. A conveyance of land, bounding it on a fresh water stream, extends to the centre or thread of the main channel of the stream. *Pike v. Munroe*, xxxvi. 309. *Robinson v. White*, xlii. 209.

133. A grant conveying land, bounded at a monument, at high water mark, thence running down river to another monument, being a short distance back from the edge of the bank; and extending back between parallel lines from said river, far enough to embrace a specified number of acres, conveys, not only the upland but the flats to the distance of one hundred rods, if they extend so far. *Pike v. Munroe*, xxxvi. 309.

134. In the construction of deeds, monuments control courses and distances. *Haynes v. Young*, xxxvi. 557. *Chandler v. McCord*, xxxviii. 564. *Melcher v. Merryman*, xli. 601. *Robinson v. White*, xlii. 209.

135. And where a line is described as a monument, the course and distance given must yield to the line. *Haynes v. Young*, xxxvi. 557.

136. A definite boundary by monuments, courses and distances, will limit the generality of a term previously used in the deed. *Haynes v. Young*, xxxvi. 557.

137. The quantity of land named governs the construction of a deed, in the absence of a reference to monuments, or of other more definite description. *Pierce v. Faunce*, xxxvii. 63.

138. The terms "more or less," neither limit nor extend the grant; but are used, in the absence of definite knowledge of the boundaries and extent of the land intended to be conveyed, to exclude a construction, that the quantity named in the conveyance should be conclusive upon the parties. *Pierce v. Faunce*, xxxvii. 63.

139. A. conveyed to the tenant one undivided quarter part of a lot of land, which he purchased of B., bounded by certain flats on the east, Fore street on the north, Commercial on the south, and extending westerly, eight rods. Subsequently, they made partition of a strip on Fore street, fifty feet wide, A. taking eighty-four feet on Fore street, and the tenant the remainder, both agreeing that the remainder of the lot should be held in common and undivided. Upon that part of the lot held in severalty, five brick stores were erected, one of which was upon the land of the tenant, who afterwards acquired a title to the store standing in west corner of A.'s part, and an undivided half of the store in the east corner of the same. Still later, the tenant obtained another undivided quarter of the common estate, upon which were a distillery and two stores, when A. conveyed to the tenant "one half part in common and undivided of a certain lot, &c., and one moiety of the buildings, consisting of a distillery and two stores, situated on the southerly side of Fore street, being part of same land I purchased of B.," referring to his deed:—*Held*, that the deed conveyed a moiety of the estate held in common and undivided only, and did not include any portion of the strip, of which partition had been made. *Jordan v. Muzzey*, xxxvii. 376.

140. One portion of the Deering wharf, so called, was owned by N. D. & J. H. I. and others, and the other portion by P. & J., on which the owners erected stores. The *owners*, and other associates, proposed to build a wharf to the channel, divide it into shares, and widen the Deering wharf; and that the owners should keep the new part open, and that width be continued to the end of said wharf for a passage-way forever. The *associates* purchased the flats on which to build, and for a dock, to be held by them as tenants in common. The *owners* covenanted with the *associates*, to enlarge their wharf to the width specified, each owner building according to his ownership. The deed of D., I. and others, of certain flats to the associates, covenanted, that so much of the Deering wharf as they widened and built, "should remain open, and to be used as a free passage and way for all the said associates and their assigns to pass to, from and upon the intended wharf and transact any business in common forever." The deed of P. & J. to the associates, contains this clause, "to the end that the said part of said wharf now owned by us, may not obstruct or impede the free passage to, from and upon the said intended wharf, we covenant that" (the widened part of Deering's wharf,) "shall remain open as a free passage and way for them, their heirs and assigns, to pass to and from and upon the wharf intended to be built from the end of Deering's wharf as aforesaid, and transact any business forever." The wharf was built. In an action to recover wharfage; — *Held*, —

1st. That the Deering wharf remained the property, in severalty, of the original owners or their grantees: —

2d. That the part added thereto, by widening, remained for use as a wharf and passage-way, and was an estate in common with the associates: — and —

3d. That the proprietors of the common estate were authorized to collect all wharfage accruing from any portion of the wharf. *Prop'rs of Long Wharf v. Palmer*, xxxvii. 379.

141. Where A. made a voluntary conveyance to G., which was void as to creditors, and the demandant derived his title to a portion of the premises through P. who had made a levy thereon, and, subsequently, G. levied upon all that part of A.'s land not levied upon by P., and then conveyed to the tenant, bounding him by the land of the demandant; — *Held*, that G. did not intend to convey any land not embraced in his levy. *Wellington v. Fuller*, xxxviii. 61.

142. Whether monuments are erected upon the face of the earth, by agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected with intent to conform to a deed already given, those monuments must control the quantity of land named in the deed. *Emery v. Fowler*, xxxviii. 99.

143. Where a lot of land is conveyed, within which is fenced a portion of the street, and the monument called for by the deed is described as standing in the line of the street, there being no uncertainty in the location of the monument or street, which is another monument referred to, and no reference made to the fence, no part of the street is embraced in the deed. *Walker v. Pearson*, xl. 152.

144. A deed purporting to convey all the grantors' real estate in a certain town named, and particularly all that belongs to them as the representatives of a certain person named, deceased, is effectual to pass their title to any lands there situated. *Bird v. Bird*, xl. 398.

145. A deed describing the land conveyed therein by numbers and range, "according to the new survey," will not authorize the use of a *plan*, proved

to have been made according to what was called the new survey, to establish the *extent* of the lots so conveyed. *Chesley v. Holmes*, XL. 536.

146. Where the limits, by numbers only, are thus left uncertain, reference must be had to other parts of the deed. And where a part of the description is, "being the farm now occupied by the S. B., in said O.," such description is more certain and will determine the extent of the lots conveyed. *Chesley v. Holmes*, XL. 536.

147. A company was allowed five years to construct their railroad, by making and filing their location, &c., on or before a certain time. After they had made a survey, and staked out the track across plaintiff's land, but before it was accepted and filed, the company purchased of him six rods in width of his land, and took a deed, describing it as "covered by the location of their railroad, or that may finally be covered by such location." Afterwards, the Legislature extended the time for filing their location, and they made a different one across the plaintiff's land, on which the road was finally constructed:—*Held*, that the company obtained no rights in such new location under the deed. *Hall v. Pickering*, XL. 548.

148. A. purchased two lots of land by one of two plans which represented them differently, and then sold one of the lots to B. by the other plan:—*Held*, that the latter plan must govern in ascertaining B.'s rights. *Wellington v. Murdough*, XLI. 281.

149. An original location, if shown to have been run and marked, is to be ascertained by tracing it from monuments established, or places where monuments were proved to have been placed or found in such location, in direct lines, whether such monuments were more or less distant from each other. *Melcher v. Merryman*, XLI. 601.

150. A person's possession is presumed to be co-extensive with his grant, where there is no adverse possession. *Melcher v. Merryman*, XLI. 601.

151. *It seems*, that land bounded on a natural lake or pond, extends only to the margin; *aliter*, if the pond be artificial. *Robinson v. White*, XLII. 209.

152. A deed described the boundary of certain land as running "to the pond to a stake and stones:"—*Held*, that this restricted the grantee to the "stake and stones," if they or their original location could be ascertained; if not, his grant extended "to the pond." *Robinson v. White*, XLII. 209.

### (c) Generally.

153. If two grantors make a joint deed of a certain tract of land, the land may pass by such deed, if owned by either of the grantors, when such can be seen to have been the intention of the parties. *Vose v. Bradstreet*, XXXVII. 156.

154. When buildings are conveyed, and are described as standing on a lot of land, it is usually apparent that it was not the intention to convey the land. In such case, the superstructure only passes. *Derby v. Jones*, XXVII. 357.

155. When it is apparent that the language is used only to describe the place where they are situated, as if the deed had stated that they stood on a certain square or street, no inference can be justly drawn, that it was not the intention that the land on which they stand, but not the lot named, should pass by the conveyance. *Derby v. Jones*, XXVII. 357.

156. By a devise or grant of a messuage or house, the land on which it



stands will pass with it, unless there be something to indicate that such was not the intention. *Derby v. Jones*, xxvii. 357.

157. But where the facts and circumstances clearly indicate that the intention of the parties was that the land should not pass, it is otherwise. *Derby v. Jones*, xxvii. 357.

158. The conveyance of a portion of the common estate by metes and bounds, by a tenant in common, will not necessarily be inoperative upon the rights of himself or others. The law will give effect to such conveyance, so far as it may do so consistently with the preservation of the entire rights of the co-tenant, and no further. If the estate so conveyed, or any part of it, shall be assigned upon partition of the premises, to the right of the grantor or his assignee, the conveyance embracing it may operate and convey the title from the grantor to the grantee. *Soutter v. Porter*, xxvii. 405.

159. Such a conveyance cannot operate contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. *Soutter v. Porter*, xxvii. 405.

160. The law will give such a construction to a deed, that it may convey, if possible, by any legal mode, the estate intended to be conveyed; but it will not permit such a construction, as would convey a different estate from that intended. *Soutter v. Porter*, xxvii. 405. *Higgins v. Wasgatt*, xxxiv. 305.

161. Deeds, which have been executed between the same parties, at the same time, cannot be construed together, so that one should be limited by the provisions contained in the other, unless they relate to the same subject matter. *Allen v. Parker*, xxvii. 531.

162. The word "beach," must be deemed to designate land washed by the sea and its waves; and to be synonymous with shore. *Littlefield v. Littlefield*, xxviii. 180.

163. The intention of the grantor, if it can be ascertained, is to be carried into effect. *Lincoln v. Wilder*, xxix. 169.

164. But if the expressions of a deed are contradictory, and it cannot be known what is the true meaning, the deed is to be construed most favorably for the grantee. *Lincoln v. Wilder*, xxix. 169. *Winslow v. Patten*, xxxiv. 25. *Pike v. Munroe*, xxxvi. 309. *Pierce v. Faunce*, xxxvii. 63. *Jordan v. Mayo*, xli. 552.

165. Where monuments are referred to in a deed, incompatible with each other, that which is the more certain and the more prominent must control. *Lincoln v. Wilder*, xxix. 169.

166. A plan is more certain than the shore. *Lincoln v. Wilder*, xxix. 169.

167. Where one has made a conveyance of land, by a deed containing a covenant of warranty, a title, subsequently acquired, will enure and be transferred to the grantee. *Pike v. Galvin*, xxix. 183. *Crocker v. Pierce*, xxxi. 177.

168. But if the deed contain no covenant of warranty, it is otherwise. *Pike v. Galvin*, xxix. 183.

169. Where an estate is conveyed, all the rents and income, which have accumulated, and which have not been so disconnected with it as to become personal property, will pass by the conveyance. *Winslow v. Rand*, xxix. 362.

170. Thus, where a dividend upon the share in a wharf had been declared,

a month after the conveyance, and it did not appear that the earnings had been disconnected with the estate, before the conveyance, as rent in arrear, or otherwise, such dividend passed with the conveyance. *Winslow v. Rand*, xxix. 362.

171. An absolute deed, which purports to be given for a good and valuable consideration, carries with it the presumption, that the grantee holds the land conveyed to his own use. *Philbrook v. Delano*, xxix. 410.

172. Where A. and the wife of B., are co-tenants of land, division deeds, made by A. and B., do not destroy the co-tenancy. *Trask v. Patterson*, xxix. 499.

173. Under R. S. of 1841, a husband obtained by his marriage only a freehold estate in the lands then owned by his wife; and a quitclaim deed of such lands, by the husband, would convey the sole use and occupancy of the same during his life. *Trask v. Patterson*, xxix. 499.

174. Where one conveys land wholly surrounded by his own, or inaccessible except through his own land, he is considered as granting, by implication, a right of way to and from it. *Trask v. Patterson*, xxix. 499.

175. One claiming under a conveyance of an equity of redemption by an officer, does not hold by a seizin adverse to that of the debtor. *Abbott v. Sturtevant*, xxx. 40.

176. If a proprietor in a tract of undivided land convey any number of acres thereof in common and undivided, the grantee is entitled to that number of acres of average quality and value with the rest of the tract. *Dyer v. Lowell*, xxx. 217.

177. If one, by deed of warranty, grant land to which he then had no title, and afterwards acquired a title, it enures, *eo instanti*, to the benefit of such grantee, or the one, if any, to whom the latter, prior to such acquisition of the title, may have conveyed it, with like covenants of warranty. *Crocker v. Pierce*, xxxi. 177.

178. Such a conveyance, in its effect, has priority to one, made to another person, after the title vested in the grantor. *Crocker v. Pierce*, xxxi. 177.

179. To constitute several conveyances parts of the same transaction, it is not necessary that the deeds bear the same date; nor that the parties should be the same persons in each of the deeds; but it will be sufficient if the deeds are delivered at the same time to accomplish the agreed purpose. *Gammon v. Freeman*, xxxi. 243.

180. A debtor, by whom a conveyance, absolute in its terms, has been made to his creditor, cannot sustain it as a payment, when it was intended to operate merely as collateral security. *Whitney v. Batchelder*, xxxii. 313.

181. An unsealed instrument, in form of a deed of conveyance of land, is not a deed. *Manning v. Laboree*, xxxiii. 343.

182. A deed, "demising and granting" land to A. B., "his heirs and assigns," with habendum for his natural life, will be held to convey a life estate only, if, from other parts of the deed, it appears that such was the intent of the parties. *Higgins v. Wasgatt*, xxxiv. 305.

183. A conveyance of "the use of land forever," is equivalent to a conveyance of the land. *Farrar v. Cooper*, xxxiv. 394.

184. In a deed, granting a part of a mill and of a mill site, within specified boundaries, an authorization to the grantee, in concurrence with the other part owners, to remove the mill and maintain it at any other spot within the

boundaries, does not limit the grant to that of an easement only. *Farrar v. Cooper*, xxxiv. 394.

185. A deed of land in trust, for the purpose of making sales, though it contain no words of inheritance, will convey a fee; and such a construction will be given, whenever it is necessary for effectuating the purposes of the trust. *North v. Philbrook*, xxxiv. 532.

186. The legal rule is, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. *Pike v. Munroe*, xxxvi. 309.

187. Such intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it. *Pike v. Munroe*, xxxvi. 309. *Prop'rs Long Wharf v. Palmer*, xxxvii. 379.

188. Whatever, in a conveyance, is expressly granted, cannot be diminished by subsequent restrictions. But general or doubtful clauses may be explained by subsequent words, or clauses, not repugnant to the express grant. *Pike v. Munroe*, xxxvi. 309.

189. The grant of a water privilege cannot be modified by any of the rules of construction, where the intention of the parties is clearly expressed in the deed. *Deshon v. Porter*, xxxviii. 289.

190. A grant of a water privilege, for a specific purpose, will restrict the grantee, or those claiming under him, to its use for that purpose alone. *Deshon v. Porter*, xxxviii. 289.

191. A provision in the grant of a water power, that the plaintiff was to keep in repair a specified proportion of the dam, cannot restrict him to the use of that proportion of the water, such construction being repugnant to the language used in the grant. *Deshon v. Porter*, xxxviii. 289.

192. A deed of a saw-mill, the sills of a part of which rest upon another mill owned by the same grantors, transfers to the grantee, the right to continue that connection during the existence of his mill, and while such connecting timbers last. *Jordan v. Otis*, xxxviii. 429.

193. Whether any title is passed by merely signing, sealing and delivering a deed, without the insertion of a name as grantor, in the body of the deed, *quere*. *Bird v. Bird*, xl. 398.

194. The grant of a principal thing carries with it all that is necessary for the beneficial enjoyment of the grant, which the grantor can convey. *Hammond v. Woodman*, xli. 177.

195. Where the grantor conveyed, by deed of warranty, "all the fishing rights, rights to the 'sand,' and all useful things that may drift upon the beach;" and the deed also contained a description of the land that constituted the beach, and words of inheritance;—*Held*, that "sand" meant "land," and the deed conveyed the fee. *Spinney v. Marr*, xli. 352.

196. The grant, by the owner of the whole stream of water, sufficient for a given purpose, precludes the grantor and his assigns from diminishing or defeating, in any way, what he has thus conveyed. *Jordan v. Mayo*, xli. 552.

197. The owner of the whole stream, with the dam and different erections thereon, conveyed certain portions of the premises, "with the privilege of drawing water from the flume connected with said building, sufficient for all the purposes of clothing and carding, and when there shall not be sufficient water for all the mills erected on said flume and privilege," the property thus

conveyed “is in all cases to have the preference:” — *Held*, that the words “erected on said flume and privilege,” did not restrain those of the preceding clause, so as to enable the grantor, or his assigns, to draw as much water for the mills on the other side of the stream and not through the same flume, as they might choose. *Jordan v. Mayo*, xli. 552.

198. A conveyance of all the right, title and interest, which the grantor has in and to the land described in his deed, conveys *only* the right, title and interest, which he *actually* has at the time of the conveyance. *Coe v. persons unknown*, xliii. 432.

See ACTION, 1.

HEIR, 13.

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## DEFAULT.

By a default, the declaration is to be taken as true, and regarded the same as it would have been if a verdict had been given. *Heath v. Whidden*, xxix. 108.

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## DELIVERY.

See SALE. DEED.

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## DEMURRER.

See PLEADING.

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## DEPOSITARY.

1. A depositary, with whom money has been lodged, to be paid to a third person, when the depositor “shall have satisfied himself” of a fact connected with the deposit, is not bound to inquire whether the fact has occurred. *Carle v. Bearce*, xxxiii. 337.

2. An indorsed note, lodged with a depositary, to be delivered to the beneficiary when a specified incumbrance shall be removed from the property for which it was given, becomes the absolute property of the beneficiary, upon the removal of the incumbrance; and the beneficiary may maintain an action on the same, although the depositary wrongfully refuses to surrender the possession of it. *Chase v. Gates*, xxxiii. 363.

## DEPOSITION.

- I. WHEN ADMISSIBLE IN EVIDENCE.
- II. CAPTION, NOTICE, TAKING, RETURNING, OPENING AND FILING DEPOSITIONS.

## I. WHEN ADMISSIBLE IN EVIDENCE.

1. Where a deposition of a party to the suit, taken to be used in another Court in a case between other parties, is offered in evidence in this Court by the opposing party, the whole deposition becomes evidence in the case. *Hammatt v. Emerson*, xxvii. 308.

2. A deposition, taken in conformity to statute of 1842, c. 1, is admissible, unless the adverse party shall show that the cause for taking such deposition has ceased to exist, and that the deponent is within thirty miles of the place of trial, and able to attend. *Brown v. Burnham*, xxviii. 38.

3. Depositions taken out of the State, by persons duly authorized, may be admitted or rejected at the discretion of the Court, although the oath was not administered to deponent before giving his deposition. *Wight v. Stiles*, xxix. 164. *Clark v. Pishon*, xxxi. 503. *George v. Nichols*, xxxii. 179. *Freeland v. Prince*, xli. 105.

4. So much of a deposition as contains the answer to an interrogatory, leading in its nature, and the interrogatory itself, propounded to a deponent in his direct examination, and objected to at the time, must be stricken out. *Cleaves v. Stockwell*, xxxiii. 341.

5. A deposition, impeaching the general reputation of an opposing witness for truth, cannot be excluded, although it also shows that the reputation was founded upon the witness' neglect to fulfil his agreements. *Hapgood v. Fisher*, xxxiv. 407.

6. A deposition, taken before a discontinuance as to one of joint defendants, to be used against all the original defendants, is admissible against the remaining defendants, after such discontinuance. *Medcalf v. Seccomb*, xxxvi. 71.

7. Section 20, c. 133, of R. S. of 1841, in regard to depositions taken on written interrogatories, has reference to such as may be taken before a magistrate on notice, as well as to those taken under a commission. *Lord v. Moore*, xxxvii. 208.

8. When a deposition is taken on written interrogatories, and incompetent testimony is drawn out in response, such testimony may be excluded, although not objected to at the time of taking. *Lord v. Moore*, xxxvii. 208.

9. If irrelevant declarations are so intermingled by the deponent with matters pertinent to the issue, that they cannot be separated without modifying the pertinent matter or rendering its meaning obscure, then the whole of his declarations become admissible. *Lord v. Moore*, xxxvii. 208.

10. Where the trustee claims to hold defendants' property by virtue of an assignment for the benefit of their creditors, and an issue is made up alleging the assignment to be fraudulent, a deposition duly taken, on notice given to the trustee, is admissible. *Totman v. Sawyer*, xxxix. 528.

11. If a witness be disqualified, by reason of interest, at the time of giving

his deposition, and at the time of trial that disqualification is removed by statute, the deposition is admissible. *Haynes v. Rowe*, XL. 181.

12. An agreement of parties, that a deposition may be used by either side in the trial of a cause, and not in terms limited to the trial at a particular term of the Court, is admissible at a subsequent trial; especially where it does not appear that the party objecting is taken by surprise, or that he asks for a continuance, in consequence of its admission by the presiding Judge. *Haynes v. Hayward*, XLI. 488.

## II. CAPTION, NOTICE, TAKING, RETURNING, OPENING AND FILING DEPOSITIONS.

13. It is not necessary that the caption of a deposition should specify the kind of action in reference to which it was taken, if it otherwise sufficiently apprise the adverse party of the particular cause in which it is intended to be used. *Scott v. Perkins*, XXVIII. 22. *Knight v. Nichols*, XXXIV. 208.

14. A deposition was taken by defendant, after service but before the entry of the writ. By the caption, notice was served upon "G. B. M., plaintiff's attorney." The only indorsement upon the writ was "from G. B. M.'s office," in the handwriting of G. B. M., who afterwards entered the action and appeared as the plaintiff's attorney in Court:—*Held*, the notice was insufficient. *Pierce v. Pierce*, XXIX. 69.

15. Where a deposition purports, in its caption, to have been taken and subscribed by a magistrate or commissioner, his official character and the genuineness of his signature, in the absence of controlling proof, are presumed. *Bullen v. Arnold*, XXXI. 583. *Palmer v. Fogg*, XXXV. 368.

16. In a notice for the taking of a deposition, if there be a defect as to the place of the taking, it is waived by the attendance of the party notified. *George v. Nichols*, XXXII. 179.

17. In depositions taken out of the State, it is not essential that the magistrate be a commissioner. *George v. Nichols*, XXXII. 179.

18. The magistrate's certificate, as to facts which he is required to state in the caption of a deposition, within this State, is conclusive evidence of the facts certified, and cannot be controlled *aliunde*. *Cooper v. Bakeman*, XXXIII. 376. *Norris v. Vinal*, XXXIII. 581. *True v. Plumley*, XXXVI. 466.

19. In order to the taking of a deposition, the adverse party or his attorney must have notice to attend. *Allen v. Doyle*, XXXIII. 420.

20. Though a practising attorney-at-law be notified to attend, and do attend and act at the taking, as the attorney of the adverse party, the deposition is not thereby rendered admissible, unless he had indorsed the writ or summons, or had appeared in the cause, or had given notice in writing that he was the attorney of the adverse party. *Allen v. Doyle*, XXXIII. 420.

21. The statute, requiring the caption of a deposition to certify that the deponent was sworn "according to law," may be complied with by the certificate in the words of the statute; or by a specification therein of the language used in administering the oath; and if the latter appears to have been what the law requires, it is sufficient. *Bachelder v. Merriman*, XXXIV. 69. *Parsons v. Huff*, XXXVIII. 137.

22. A certificate, that "the deponent was first sworn and was examined according to law," is insufficient. *Bachelder v. Merriman*, XXXIV. 69.

23. The statute does not require the caption to state at whose request the deposition was taken. *Knight v. Nichols*, xxxiv. 208.

24. The caption of a deposition sufficiently states the cause in which it is to be used, if it name the parties and the Court in which the trial is to be had. *Knight v. Nichols*, xxxiv. 208.

25. A deponent, before giving his deposition, is to be sworn to testify the truth, the whole truth and nothing but the truth, relating to the cause or matter for which the deposition is to be taken. R. S., 1841, c. 133, § 15. *Brighton v. Walker*, xxxv. 132.

26. A caption, which certifies that "the deponent was first sworn according to law, to the deposition by him subscribed, is insufficient. RICE, J.; HOWARD and HATHAWAY, J. J., dissenting. *Brighton v. Walker*, xxxv. 132. *Erskine v. Boyd*, xxxv. 511.

27. Where, after the taking of a deposition, the term of the Court at which it was returnable has been abolished, and its business transferred to a subsequent term, the deposition may be rightfully opened and filed at such subsequent term. *Palmer v. Fogg*, xxxv. 368.

28. Unless referred to in the caption, neither the original citation, nor the officer's return upon it can be received to control the magistrate's certificate, even though they be annexed. *Medcalf v. Seccomb*, xxxvi. 71. *Norris v. Vinal*, xxxiii. 581.

29. A certificate that "the adverse party was duly notified to attend, as will appear by the notice annexed," makes the notice part of the certificate, and re-examinable by the Court. *Porter v. Pillsbury*, xxxvi. 278.

30. The time allowed on citation to take depositions has relation to the distance from the usual place of abode of the party cited, to the place of caption, and not from the place where he may happen to be found. *Porter v. Pillsbury*, xxxvi. 278.

31. Notice to the adverse party's attorney of record is sufficient, although the party taking the deposition had been informed, prior to such notice, that said attorney had retired from the action. *Herrin v. Libbey*, xxxvi. 350.

32. The magistrate's certificate to a deposition is evidence only of such facts as the statute requires him to certify. *Hall v. Houghton*, xxxvii. 411.

33. Depositions, taken without notice to the adverse party, as required by law, cannot be used, except by consent of parties. *Hall v. Houghton*, xxxvii. 411.

34. Although the "adverse party" was present at the taking of the deposition, this fact is not evidence that he had the legal notice, or that he waived it. *Hall v. Houghton*, xxxvii. 411.

35. All objections to the technicality or formality of interrogatories in depositions must be specifically made, at the time of the caption; but objections to matters of substance need not be made until trial. *Parsons v. Huff*, xxxviii. 137.

36. The statute requires the deponent to be sworn but once, and that before giving the deposition. *Parsons v. Huff*, xxxviii. 137.

37. If the certificate states that the deponent, after giving his deposition, was duly sworn according to law, it will not remedy any omission in complying with the statute requirement. *Parsons v. Huff*, xxxviii. 137.

38. The caption must show that, before giving his deposition, the deponent was sworn to testify the truth, &c., "relating to the cause for which

the deposition is to be taken," or it will be insufficient. *Parsons v. Huff*, xxxviii. 137.

39. The discretion of the Court in admitting or rejecting depositions, taken out of the State, has never been defined; but the practice has been to admit them when the Judge is satisfied that there has been a substantial compliance with the statute. *Freeland v. Prince*, xli. 105.

40. The certificate that the deponent "being first duly sworn, gave his aforesaid deposition," imports that he was sworn according to law, before giving it. *Dennison v. Benner*, xli. 332.

41. A justice of the peace is not authorized, by the statute, to take depositions in cases where he is, or has been, counsel or attorney. *Cutler v. Maker*, xli. 594.

42. But such justice may issue notices to the adverse party, returnable before another magistrate. *Cutler v. Maker*, xli. 594.

## DESERTER.

1. A deserter, from the army of the United States, may be arrested and confined for trial by his appropriate officers, without a warrant. *Hutchings v. Van Bokkelen*, xxxiv. 126.

2. It is no infraction of the deserter's rights, that the county jail is used as the place of his confinement. *Hutchings v. Van Bokkelen*, xxxiv. 126.

3. Such confinement, for the space of ten days, is not unjustifiable, unless it appear that a court martial could have been convened for his trial within that period. *Hutchings v. Van Bokkelen*, xxxiv. 126.

## DEVISE AND LEGACY.

### I. OF LEGATEES AND DEVISEES, AND THEIR SEIZIN.

### II. WHEN A DEVISE IS IN FEE, FOR LIFE, IN TAIL, OR OTHERWISE.

### III. WHETHER A DEVISE OR LEGACY IS SPECIFIC, ABSOLUTE, CONDITIONAL, CONTINGENT, OR EXECUTORY.

### IV. REMEDIES, FOR AND AGAINST.

### I. OF LEGATEES AND DEVISEES, AND THEIR SEIZIN.

1. The title of a devisee, under a foreign will, commences upon the death of the testator. *Put. F. School v. Fisher*, xxx. 523.

2. A devise of real estate to T. L. with the proviso, that if he is not then living or should not live to claim and receive the same, then to go to J. S. L., vests the title in T. L., at the death of the testator. *Rawson v. Clark*, xxxviii. 223.



3. A general devise, of all the testator's real estate, will include estate held in trust, unless it clearly appear in the will that such was not the testator's intention. *Richardson v. Woodbury*, XLIII. 206.

See ACTION, 22.

DOWER, 37.

## II. WHEN A DEVISE IS IN FEE, FOR LIFE, IN TAIL, OR OTHERWISE.

4. A devise of the income of land to the use of the devisee during his life, confers upon him a life estate in the land. *Butterfield v. Haskins*, XXXIII. 392. *Earl v. Rowe*, XXXV. 414. *Stone v. North*, XLI. 265.

5. A devise of the care and management of land and of the disposition of its income, during the life of the devisee, for the benefit of another, confers upon the devisee a life estate, in trust. *Butterfield v. Haskins*, XXXIII. 392.

6. A devise to a person and his heirs, with a devise over, in case he should die without issue, vests in the first devisee an estate in fee tail, and a remainder in the second devisee. *Fisk v. Keene*, XXXV. 349.

7. Land was devised to M., his heirs and assigns, with devise over, (in case he should die without "heirs,") to his wife during life or widowhood; and, at the termination of her estate, to the devisor's surviving children or their heirs:—*Held*, that the devise to M. was not limited to a life estate in him;—that it could not take effect as an executory devise;—that it did not vest in M. a fee simple conditional, but a fee tail general. *Fisk v. Keene*, XXXV. 349.

8. A direction, by the testator, that A. B. "shall receive for his support the net profits of the land," is a devise of the land itself. *Earl v. Rowe*, XXXV. 414.

9. "I give and bequeath unto my son, O. P., the land he is now in possession of, also one-half of lot No. 5, to him during his natural life to improve, and then to his heirs after him for their sole right," devises only a life estate to O. P., where the other clauses in the will furnished no evidence of an intention to devise an inheritance. *Pratt v. Leadbetter*, XXXVIII. 9.

10. A. devised the "use, income or interest," of certain personal estate, to his wife during her natural life:—*Held*, that the devise was not an annuity, but a life estate. *Stone v. North*, XLI. 265.

11. A devise of land to another generally or indefinitely, with a power of disposing of it, is a devise in fee. *Shaw v. Huzzey*, XLI. 495.

12. Such a devise, without words of inheritance, is treated as equivalent to a devise with words of inheritance. *Shaw v. Huzzey*, XLI. 495.

13. When the testator gives to the first taker an estate for life *only*, by certain and express words, and annexes a power of disposal, the fee does not vest in the legatee. *Shaw v. Huzzey*, XLI. 495.

14. A testator, in the first item of his will, "gave and bequeathed to his wife all his estate, real and personal, during her natural life," &c. In the sixth item, he willed, "that, at the decease of his wife, all his real estate, that may remain unexpended by her, be divided in equal shares between," &c.:—*Held*, that this being in express terms a devise for life only, the wife did not take an estate in fee; but the power of disposal being given her by implication, in the words, "that may remain unexpended by her," she could sell the lands at her discretion. *Shaw v. Huzzey*, XLI. 495.

### III. WHETHER A DEVISE OR LEGACY IS SPECIFIC, ABSOLUTE, CONDITIONAL, CONTINGENT, OR EXECUTORY.

15. Where a testator provided that any of his children, after they should come of age; should have the privilege of continuing at home in pursuit of the common business of the family, and to receive for their labor, at the rate of \$130 a year, for the boys, and 75 cents per week, for the girls; *it seems*, that the services rendered were conditions upon which they should receive said sums, and that they were legacies, which might be recovered against the executor. *Mayall, appellant*, xxix. 474.

16. A different rule prevails in relation to devises, than that in conveyances; and after-born children may take in such cases by way of executory devise. *Butterfield v. Haskins*, xxxiii. 392.

17. A devise over, after a devise in fee, cannot take effect as an executory devise, unless the event upon which it is to vest must necessarily happen within the prescribed period of a life or lives in being, and twenty-one years, and the period of gestation thereafter. *Fisk v. Keene*, xxxv. 349.

18. As it is not matter of necessity that an indefinite failure of issue will happen within the prescribed period, a devise to a person and his heirs, with a devise over in case of his "dying without issue," cannot operate as an executory devise. *Fisk v. Keene*, xxxv. 349.

### IV. REMEDIES, FOR AND AGAINST.

19. Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of a testator to make an estate, specifically devised, the fund for the payment of the legacy is clearly exhibited, such legacy is a charge upon the estate; and a court of equity may decree that the person in whom the estate is vested shall execute the trust. *Bugbee v. Sargent*, xxvii. 338.

20. Where a testator provided, that any of his children, after they should come of age, should have the privilege of continuing at home in pursuit of the common business of the family, and to receive for their labor at the rate of \$130 a year for the boys, and 75 cents per week for the girls; *it seems*, that the services rendered were conditions upon which they should receive said sums, and that they were legacies, which might be recovered in an action at law against the executor. And that such legacies might accumulate until the division of the estate fixed by another clause in the will. *Mayall, appellant*, xxix. 474.

21. After the lapse of a year, an action for a legacy may be maintained by a residuary legatee against the executor, before a final settlement of the estate, if there are assets in the hands of the executor, upon which there are no superior claims. *Smith v. Lambert*, xxx. 137.

22. If there appear superior claims upon the assets, to their full amount, the residuary legatee must be postponed. *Smith v. Lambert*, xxx. 137.

23. Where the testator has mistaken the christian name of a legatee, the error may be corrected, as to its effect, on a bill in equity. *Wood v. White*, xxxii. 340.

24. If, under the will, the devisee take an estate in fee, subject to life trust, his creditor, by a levy of his estate in remainder, can take no enjoyment of the income, until the death of the devisee. *Butterfield v. Haskins*, xxxiii. 392.

## DISCLAIMER.

See REAL ACTION.

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## DISSEIZIN.

See SEIZIN AND DISSEIZIN.

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## DISTRIBUTION OF ESTATES.

1. The estate of an intestate must be distributed according to the laws in force at the time of his death. *Hughes v. Decker*, xxxviii. 153.

2. If, after the death of the intestate, and before the sum to be distributed is collected, the law as to the distribution of the estate is changed, such change cannot affect the rights of the distributees at the time of the death. *Hughes v. Decker*, xxxviii. 153.

3. Section 19, c. 38, of the laws of 1821, providing "that if there be no kindred to the intestate, then the widow shall be entitled to the whole of said residue," meant lawful kindred only. *Decker v. Hughes*, xxxviii. 153.

4. Under that statute, the mother of an illegitimate child cannot claim to be of lawful kindred with her child. *Decker v. Hughes*, xxxviii. 153.

5. The division of an estate in the Probate Court, in which a parcel is set out to an heir long before dead, is invalid. *Wass v. Bucknam*, xxxviii. 356.

6. If the owner of land execute a lease of it for a series of years and die, the accruing rents, after his death, descend to his heirs. *Stinson v. Stinson*, xxxviii. 593.

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## DISTRICT COURT.

1. By R. S. of 1841, the District Court has power, after verdict and before judgment, on motion and without any additional evidence, to set aside the verdict of a jury in a bastardy process, because, in the opinion of the Court, against evidence, and grant a new trial. *Eaton v. Elliott*, xxviii. 436.

2. The Act establishing town courts, in the county of Waldo, did not impair or diminish any of the existing powers of the District Court. *Abbott v. Knowlton*, xxxi. 77.

3. After that Act, as well as before, the District Court had original jurisdiction of all civil suits, wherein the sum demanded was between twenty and two hundred dollars. *Abbott v. Knowlton*, xxxi. 77.

4. The District Court has authority to correct mistakes in its records and processes. *Morrell v. Cook*, xxxi. 120.

5. In a personal action, the writ was directed to a constable, who attached real estate thereon. The execution, which issued thereon from the District Court, was not so directed; but the constable levied upon the real estate, within thirty days from judgment:—*Held*, that the District Court might allow the amendment, by inserting a direction to the constable, although the levy had been previously recorded, and the land conveyed by the debtor to a third person, after the attachment and before the levy. *Morrell v. Cook*, xxxi. 120.

6. When, by a statute, jurisdiction of an offence is given to a justice of the peace, or a police or municipal court, but is not declared to be exclusive, the District Court has concurrent jurisdiction of the same offence. *State v. Billington*, xxxiii. 146.

## DIVORCE.

1. The Act of 1829, c. 440, permitting divorces to be decreed, for desertion, for the term of five years, without reasonable cause, is not retrospective. *Given v. Marr*, xxvii. 212.

2. The Act of 1847, c. 13, did not repeal the laws relating to divorce then in force; but merely gave further power to the Court, "to decree a divorce" *a vinculo*, in cases not then "provided for by law." *Anonymous*, xxvii. 563. *Ricker v. Ricker*, xxix. 281.

3. The Court, therefore, could not decree a divorce, under the third provision of R. S. of 1841, c. 89, § 2, nor under Act of 1847, c. 13, for desertion of one of the parties for a time less than "the term of five successive years." *Anonymous*, xxvii. 563. *Ricker v. Ricker*, xxix. 281. *Small v. Small*, xxxi. 493.

4. Where a wife deserted her husband without cause, for a few months, but went back, confessed to him the wrong and promised a return to duty, and requested admission again into his family, and he refused to receive her, and for five years neglected to provide for her support, such refusal constitutes a desertion on his part, for which she may maintain a libel. *Fellows v. Fellows*, xxxi. 342.

5. The provisions of R. S. of 1841, which prescribe the causes for which divorce may be decreed, are not repealed by the Act of 1849, c. 116. *Motley v. Motley*, xxxi. 490. *Small v. Small*, xxxi. 493. *Elwell v. Elwell*, xxxii. 337.

6. Under the former, the party injured could *claim* a divorce as matter of right; while under the latter, the appeal can be made merely to the discretion of the Court. Both are in harmony, and both in force. *Motley v. Motley*, xxxi. 490. *Elwell v. Elwell*, xxxii. 337.

7. The discretionary power, conferred upon the Court by the Act of 1849, is applicable only to causes not provided for in R. S. *Motley v. Motley*, xxxi. 490.

8. A combination of such wrongs as might, each, become, by a sufficient length of continuance, a ground of divorce, falls within the provisions of the

Act of 1849, and may be ground for immediate divorce. *Motley v. Motley*, xxxi. 490.

9. Under the Act of 1849, a divorce, *a vinculo*, will not be granted for such cause only, as under R. S., 1841, c. 89, gave a right to a divorce *a mensa et thoro*. *Elwell v. Elwell*, xxxii. 337.

10. If a husband or wife, from whom the other party has procured a divorce, would seek relief from the disabilities imposed by the statute, upon the decree of such a divorce, the application must be returnable in the county in which the applicant resides. *Tarbell, Pet'r*, xxxii. 589.

11. A divorce, *a vinculo*, effectually and fully abrogates the marriage contract and sets the parties free from their marital relations to each other. *State v. Weatherby*, xliii. 258.

## DONATIO CAUSA MORTIS, ET INTER VIVOS.

1. A promissory note, made by a third person, is a proper subject of a donation *causa mortis*. *Parker v. Marston*, xxvii. 196.

2. If a promissory note be given and delivered by the payee to a third person, because the donee expects soon to die of the disorder then upon him, it is revocable at any time during the donor's life; and the same may afterwards be given to any one else. *Parker v. Marston*, xxvii. 196.

3. To constitute a donation *inter vivos*, there must be a gift absolute and irrevocable, without reference to its taking effect at some future time. The donor must deliver the property, and part with all present and future dominion over it. *Dole v. Lincoln*, xxxi. 422. *Allen v. Polereczky*, xxxi. 338.

4. To constitute a *donatio causa mortis*, the gift must be made in contemplation of the near approach of death, and to take effect absolutely, only upon the death of the donor. There must be a delivery of the property to the donee, or to some other person for his use. The donor must part with all dominion over it, so that no further act of him, or of his personal representatives, is necessary to vest the title perfectly in the donee, should it not be reclaimed by the donor during his life. *Dole v. Lincoln*, xxxi. 422.

5. The donor must part with all dominion over the property to the donee, to belong to him presently, as his own property, in case the donor should die without making any change in relation to it. *Dole v. Lincoln*, xxxi. 422.

6. If the property be intended, not for the benefit of the donee, but, as a trust fund, to be dispensed for benevolent uses, at the entire and unlimited discretion of the donee, the alienation cannot be sustained. *Dole v. Lincoln*, xxxi. 422.

7. Donations, not made in conformity to the statutes of wills and frauds, but rather suited to contravene them, are not favored by the law. *Dole v. Lincoln*, xxxi. 422.

## DOWER.

- I. WHO IS ENTITLED TO DOWER, AND NATURE OF THE RIGHT.
- II. OF WHAT A WIDOW IS DOWABLE.
- III. BAR OF DOWER.
- IV. HOW DOWER IS RECOVERABLE.

## I. WHO IS ENTITLED TO DOWER, AND NATURE OF THE RIGHT.

1. An inchoate right of dower is an existing incumbrance, within the meaning of the covenant against incumbrances. *Smith v. Cannell*, xxxii. 123.

2. By R. S. of 1841, c. 95, a widow who elects to take the provisions made for her, in her husband's will, has no right to dower also in his estate, unless it plainly appear by the will to have been the testator's intention. *Hastings v. Clifford*, xxxii. 132.

3. When not entitled to both, she will be considered as accepting the provision in the will, unless, within six months from the probate of the will, she waives such provision. *Hastings v. Clifford*, xxxii. 132.

4. But if the widow "be deprived of the provision," or a substantial part of it, "made for her by the will," she is entitled to dower, as if no provision had been made. R. S., 1841, c. 95, § 14. *Hastings v. Clifford*, xxxii. 132.

5. But whether, in case of failure in the provision made for her by the will, she be entitled to dower, if, before the expiration of said six months, she knew of such failure, and made no election to claim dower, *quare*. *Hastings v. Clifford*, xxxii. 132.

6. A widow's right of dower, before it is assigned to her, rests only in action. *Johnson v. Shields*, xxxii. 424. *Bolster v. Cushman*, xxxiv. 428.

7. A widow may redeem real estate, mortgaged by her husband during coverture, although the rights of the mortgagee and mortgager have both come by assignments to the defendant, and although, in the mortgage deed, she relinquished her right of dower. *Simonton v. Gray*, xxxiv. 50.

8. It is only when the husband dies *seized*, that the R. S. of 1841, c. 95, § 6, secures to the widow, prior to the assignment of dower, a third of the rents and profits of his land. *Bolster v. Cushman*, xxxiv. 428.

9. The word "dower," both technically, and in popular acceptance, has reference to real estate exclusively. *Dow v. Dow*, xxxvi. 211.

## II. OF WHAT A WIDOW IS DOWABLE.

(a) WHAT SEIZIN OF THE HUSBAND IS NECESSARY.

(b) OF WHAT LANDS, AND OF WHAT PORTION THEREOF, A WIDOW IS DOWABLE.

(a) *What seizin of the husband is necessary.*

10. The wife is not entitled to dower, during the life of her husband, in lands of which he had been seized during coverture, and had conveyed prior to the Act of 1829, c. 440, or the Act of 1838, c. 342, although she subsequently obtained a divorce under said Acts. *Given v. Marr*, xxvii. 212. *Curtis v. Hobart*, xli. 230.

11. If the grantee, upon receiving a conveyance of land, as a mere instru-

ment, conveys it to another, without receiving any beneficial interest in it himself, he has no such seizin as will entitle his widow to dower. *Gammon v. Freeman*, xxxi. 243.

12. If his conveyance be by mortgage, and the estate be forfeited and held by virtue of the mortgage, his interest as mortgager is not such a beneficial interest as to be the foundation of a claim of dower. *Gammon v. Freeman*, xxxi. 243.

13. A widow will not be entitled to dower, when it appears that the seizin of her husband has been defeated by an elder and better title. *Brown v. Williams*, xxxi. 403.

14. If a debtor intermarry after an attachment of his real estate, and dies subsequent to the levy, made within thirty days after judgment and duly recorded, he has no such seizin as will entitle his widow to dower. *Brown v. Williams*, xxxi. 403.

15. Nor where land is mortgaged by the grantee to the grantor, at the same time he receives his deed, or to a third person, to secure him for making a payment for the land. *Smith v. Stanley*, xxxvii. 11. *Grant v. Dodge*, xliii. 489.

16. But if the mortgagee discharge the mortgage, or the debt thereby be paid, the seizin of the mortgager takes effect from the time of the original deed, and his widow will be dowable therein. *Smith v. Stanley*, xxxvii. 11.

17. If the mortgagee subsequently release to a third person his lien to one-half of the land, and receive new notes for the amount due him, and take a new mortgage from the original mortgager and such third person; this will not discharge the prior mortgage, so as to establish the seizin of the prior mortgager to more than the one-half released. *Smith v. Stanley*, xxxvii. 11.

18. Where land was conveyed to the demandant's husband, and he mortgaged it back at the same time to secure the purchase money, the demandant, as against the mortgagee or assignee, is dowable of only an equity of redemption; but against all others, she has a right of dower in the land. *Young v. Tarbell*, xxxvii. 509.

19. The husband of a demandant in dower must have had an actual or corporeal seizin, or a right to such seizin. *Mann v. Edson*, xxxix. 25.

20. But possession is indicative of seizin until rebutted by evidence of a paramount title. *Mann v. Edson*, xxxix. 25.

21. If the husband paid the money for the land, and the deed was made to another in fraud of creditors, and the husband received a life lease and continued in possession till his death, this is no such seizin as will entitle his wife to dower. *Mann v. Edson*, xxxix. 25.

22. The widow shall not be endowed when her husband was seized but for an instant, though a continued seizin, however short, entitles her to dower. *Grant v. Dodge*, xliii. 489.

23. If the tenant would defeat the demandant's claim of dower, he must prove that the deed and mortgage relied on, constituted one transaction. *APPLETON, J.*, non-concurring. *Grant v. Dodge*, xliii. 489.

(b) *Of what lands, and of what portion thereof, a widow is dowable.*

24. At common law, in the assignment of dower, a widow is entitled to one third out of each tract or parcel of the land; which endowment is denominated "according to common right." *French v. Pratt*, xxvii. 381.

25. Where dower is assigned by the heir, he may assign the whole of one or more of the several tracts in lieu of a third of each one, which will be a good assignment if accepted by the widow; which endowment is "against common right." *French v. Pratt*, xxvii. 381. *French v. Peters*, xxxiii. 396.

26. If dower be assigned "according to common right," and the widow be evicted, by a paramount title, of the third assigned to her in one parcel, she is entitled to be endowed anew in the remainder of that parcel. *French v. Pratt*, xxvii. 381.

27. But if the widow be endowed "against common right," and be evicted of a part of the land assigned to her, she can have no new assignment, by reason thereof, in lands in which dower was not assigned. *French v. Pratt*, xxvii. 381.

28. Such is the law, whether the assignment was made under probate or common law jurisdiction; c. 95, § 14, being but an affirmance of the common law. *French v. Pratt*, xxvii. 381.

29. An acceptance by the Probate Court of an assignment "against common right," is an acceptance by the widow, she having the right to be heard. *French v. Pratt*, xxvii. 381.

30. The widow is entitled to have such a part of the land set out to her as dower, as will produce an income equal to one-third part of the income which the whole estate would now produce, if no improvements had been made upon it since it was conveyed by the husband. *Garter v. Parker*, xxviii. 509.

31. Where a simple partition of a common estate is made, the right of the widow of each tenant to claim dower is restricted to the share assigned or conveyed to the husband. *Mosher v. Mosher*, xxxii. 412.

32. Where partition be not made by assigning to each his own share, but in unequal shares and of unequal values, and especially for other considerations than an equal division, the widow's right is not so restricted. *Mosher v. Mosher*, xxxii. 412.

33. A widow is dowable in an equity of redemption, as against the mortgagee or assignee; but against all others, in the land. *Manning v. Laboree*, xxxiii. 343. *Simonton v. Gray*, xxxiv. 50. *Young v. Tarbell*, xxxvii. 509.

34. In an action of dower, against the heir, the increased value of the land, independent of the labor and expenditures of the tenant, is subject to the widow's dower. *Manning v. Laboree*, xxxiii. 343.

35. Where an assignment, made "against common right," has been avoided in a portion of the land assigned, by virtue of a foreclosed mortgage given by the husband, the widow is restored to her original right of dower in such portion. *French v. Peters*, xxxiii. 396.

36. The annual value of a widow's dower, in a mortgaged estate, is found by deducting, from one-third of the net annual income of the whole estate, one-third of the annual interest on the amount of the mortgage debt due. *Simonton v. Gray*, xxxiv. 50.

37. A testator devised one undivided fourth part of his mills and real estate connected therewith, to his executors, in trust for S. W. D., during her natural life, on condition that they would retain and pay over the income of that part towards removing the incumbrances, and towards the consideration for it, until one-fourth of the incumbrance and consideration, remaining unpaid, were discharged; subject also to its proportion of the repairs:—



He also devised to his executors all his real and personal estate, excepting said fourth part, to be held in trust for the payment of his debts, legacies and bequests; and to pay the increase thereof, subject to the support of his family, towards said debts, &c., when said trust was to cease:—

He also bequeathed all the residue of his estate to his three children, having made no provision in his will for his wife:—

The dower in the mills was determined to be one-third of the rents and profits. And after the proportional part of incumbrances and consideration were discharged, the executors withheld one-third of the net income of said fourth to discharge the widow's claim for dower:—

*Held*, that such specific devise was subject to dower, without contribution or remuneration from the residuary estate. *Drummond v. Drummond*, *XL*. 35.

### III. BAR OF DOWER.

38. A married woman, who joins her present husband in a conveyance of real estate, by relinquishing her right of dower therein, is estopped to claim dower under her former husband. *Usher v. Richardson*, *XXIX*. 415.

39. In a suit for dower, against the assignee of a mortgagee, the demandant is not barred, by having joined with her husband, for the purpose of releasing dower, in his conveyance of the equity of redemption to a third person. *Littlefield v. Crocker*, *XXX*. 192.

40. A delay of more than six months to make the election, whether she will waive the provisions of the will, is considered an acceptance of the same, and bars a widow's dower. *Hastings v. Clifford*, *XXXII*. 132.

41. A widow's release or conveyance of her right of dower, except to a party in possession or in privity of the estate, from which it accrued, is without effect. *Johnson v. Shields*, *XXXII*. 424.

42. An unsealed instrument, in form of a deed, signed by husband and wife, though containing a formal relinquishment of her dower, is no bar to her right. *Manning v. Laboree*, *XXXIII*. 343.

43. It is not a bar to an action of dower, that the widow of an earlier proprietor has already recovered dower against the tenant. In such case, her right is one-third of the remaining two-thirds, together with the contingent right to an endowment in the first third, whenever the first endowment should be extinguished. *Manning v. Laboree*, *XXXIII*. 343.

44. The Act of 1821, relating to the mode of relinquishing a right of dower, superseded all former ordinances, acts and usages on that subject. *French v. Peters*, *XXXIII*. 396.

45. The Act of 1821, c. 40, § 6, gave no efficacy to a widow's relinquishment of her right of dower, unless her husband joined in its execution. *French v. Peters*, *XXXIII*. 396.

46. A release, by a married woman, executed while that statute was in force, in which the husband did not join, though indorsed upon his conveyance, and alleged to be in consideration of the sum mentioned in his conveyance, constitutes no bar. *French v. Peters*, *XXXIII*. 396.

47. An unsealed agreement by a dowress, (after having recovered judgment for her dower,) made with the warrantor of the judgment-tenant, that she would receive a specified sum yearly, during life, in lieu of dower, is not a release of dower. *Sargent v. Roberts*, *XXXIV*. 135.

## IV. HOW DOWER IS RECOVERABLE.

## (a) DEMAND AND ASSIGNMENT.

## (b) ACTION OF DOWER, PLEADINGS, EVIDENCE AND DAMAGES.

(a) *Demand and assignment.*

48. The demand of dower must be made "of the person who is seized of the freehold, at the time of making the demand, if he be in this State, otherwise, of the tenant in possession. *Luce v. Stubbs*, xxxv. 92.

49. So it may be made by parol, and by one authorized by parol. *Luce v. Stubbs*, xxxv. 92. *Curtis v. Hobart*, xli. 230.

50. It need not be made upon the land in which dower is claimed. *Luce v. Stubbs*, xxxv. 92.

51. A paper, addressed to the tenant and subscribed by the widow, containing in proper form a demand of dower, if seasonably received by him, will constitute a sufficient demand. And although not proved to have been originally made upon him in person. *Luce v. Stubbs*, xxxv. 92.

52. A demand, for dower in land owned by minor children, made on them and their guardian, is sufficient, although the person is not described as guardian. *Young v. Tarbell*, xxxvii. 509.

53. Dower may be assigned by parol. And by a guardian. *Curtis v. Hobart*, xli. 230.

(b) *Action of dower, pleadings, evidence and damages.*

54. In an action of dower, the thirty-fourth rule does not authorize the admission of an office copy of a deed, acknowledged by her husband, though not by her, and recorded, purporting to be a conveyance of the premises by the husband, and a relinquishment by her of her right to dower, without the proper proof of the loss of the original. *Sellars v. Carpenter*, xxvii. 497.

55. In dower, the marriage of the demandant may be inferred from proof of long cohabitation, continued until the death of the alleged husband, being received and treated as his wife, and their having brought up and educated a family of children as their own. *Carter v. Parker*, xxviii. 509.

56. Conveyance of the premises, wherein dower is claimed, to the husband by deed of warranty, and his conveying the same to another or to the tenant, during coverture, is sufficient proof of seizin, in the absence of evidence to the contrary. *Carter v. Parker*, xxviii. 509. *Thorndike v. Spear*, xxxi. 91.

57. Damages recoverable in an action of dower are one-third of the value of the income of the premises per annum, from one month after the time of demand to the time of judgment. *Carter v. Parker*, xxviii. 509.

58. Where the demandant, to prove her husband's seizin, introduced a deed to him, another from himself to another, and from such third person to the tenant:—*Held*, that the effect of such proof is not repelled by proof that the husband, at the time of his conveyance, had recovered judgment against a third person for the land, in a writ of entry upon his own seizin, but had not paid to the tenant the amount assessed by the jury for betterments, but did pay the same within the year allowed by the statute. *Thorndike v. Spear*, xxxi. 91.

59. Though one, claiming land under a conveyance from the husband of a demandant in dower, be estopped to deny the seizin of the husband, he is

entitled to show, that the seizin was not of such a character as to confer a right of dower. *Gammon v. Freeman*, xxxi. 243.

60. To an action of dower, non-tenure can be pleaded in abatement only. *Manning v. Laboree*, xxxiii. 343. *Young v. Tarbell*, xxxvii. 509.

61. A demand in dower may be proved by admissions of the tenant, or it may be inferred from facts and circumstances proved. *Luce v. Stubbs*, xxxv. 92.

62. Proof, that a paper, addressed to the tenant and signed by the demandant, containing in rightful form a demand of her dower, was seasonably left at the dwellinghouse of the tenant, where it was read by some of the inmates, taken in connection with the admission that dower had been demanded of him, will authorize the jury to infer that the paper was received and understood by him. *Luce v. Stubbs*, xxxv. 92.

63. It is no defence to an action of dower, that dower has been assigned in the premises to a widow, whose right was subsequent to that of the demandant. *Young v. Tarbell*, xxxvii. 509.

64. If an administrator, whose intestate owned land incumbered by a mortgage, which land is not needed to pay the debts of the intestate, or charges of administration, purchase such mortgage, the heirs cannot set it up in his hands to defeat the widow of the mortgager of her dower. *Young v. Tarbell*, xxxvii. 509.

65. The legality of the proceedings, in the assignment of dower, cannot be contested by one having no interest to be affected thereby. *Rawson v. Clark*, xxxviii. 223.

66. Possession is indicative of seizin, until rebutted by evidence of a paramount title in the tenant. *Mann v. Edson*, xxxix. 25.

67. In dower, the declarations of demandant's husband as to his equitable title are immaterial and inadmissible. *Mann v. Edson*, xxxix. 25.

68. In dower, if the plea *ne unques accouple* conclude by tendering an issue to the country, it is bad on demurrer. *Freeman v. Freeman*, xxxix. 426.

69. But if the declaration be bad also, the judgment must be against the party committing the first fault in pleading. *Freeman v. Freeman*, xxxix. 426.

70. Unless the declaration allege a seizin of the husband, of an estate of which by law his widow is dowable, it is defective and insufficient. *Freeman v. Freeman*, xxxix. 426.

71. So it must also show, that the demand was made on the one then seized of the freehold, if within the State; otherwise on the tenant in possession. *Freeman v. Freeman*, xxxix. 426.

72. The demandant in dower, having recovered judgment for her dower, and damages for detention thereof, cannot maintain a separate action against the tenant for the use of the premises, from the date of the verdict, to the time of the actual assignment. *Purrington v. Pierce*, xli. 529.

## DURESS.

1. By duress, is meant that degree of severity, either threatened or impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. *Fellows v. Fayette*, xxxix. 559.

2. Duress *per minas* is restricted to the fear of remediless harm to the person. *Fellows v. Fayette*, xxxix. 559.

3. The plea of duress of imprisonment is supported by any evidence, that the party was *unlawfully* restrained of his liberty, until he would execute the instrument. *Fellows v. Fayette*, xxxix. 559.

See *BILLS, &c.*, 162, 163.

## DWELLINGHOUSE.

See *CURTILAGE. CONTRACT*, 94.

## EASEMENT.

1. An easement may be extinguished. *Ballard v. Butler*, xxx. 94.

2. An easement, created by reservation in a deed, and consisting in a right to take water from a well, imposes upon the owners of the servient estate the obligation to keep the well in repair, or in a condition to be used. Such a reservation does not assure the right in the well as a permanency, but only so long as it existed in a suitable state for use. *Ballard v. Butler*, xxx. 94.

3. Such an easement is destroyed by erecting buildings of a permanent character over and upon the well. *Ballard v. Butler*, xxx. 94.

4. For the wilful destruction of the easement by the erection of such buildings by the owner of the servient estate, damages may be recovered. *Ballard v. Butler*, xxx. 94.

5. One who purchases the dominant estate, after the extinguishment of the easement, can have no remedy against one who has purchased the servient estate, after such extinguishment. *Ballard v. Butler*, xxx. 94.

6. Easements, in another's land, may be acquired by prescription, either by communities or individuals. Easements, so acquired, are, in legal intendment, without profit. *Littlefield v. Maxwell*, xxxi. 134.

7. Until an easement in a street has been acquired by the public, any erection made upon the street, by which the use of it as a passage way is obstructed, the owner of the soil adjoining may treat as a private nuisance, and recover damages. *Sutherland v. Jackson*, xxxii. 80.

8. The reservation of a right to pass upon an old pathway to one lot of land, may not confer the right to pass further upon the same pathway to another lot. *Farley v. Bryant*, xxxii. 474.

9. A public road is an easement. *Haynes v. Young*, xxxvi. 557. *Vassalboro' v. S. & K. R. R. Co.*, xliii. 337.

10. Merely abutting one's mill-dam upon the opposite shore, without claim of right, may create an easement after its continuance for twenty years, but will not divest the owner of the shore of his title. *Trask v. Ford*, xxxix. 437.

11. Such acts are assumed to be in submission to the title of the owner, unless they appear to be adverse. *Trask v. Ford*, xxxix. 437.

12. When such dam is joined to the opposite shore by consent of the owner, its materials belong to the builder of the dam. *Trask v. Ford*, xxxix. 437.

13. And while the dam remains, the owner of the shore may so interfere with it as to enjoy his rights, but not to appropriate any of the materials to his individual use. *Trask v. Ford*, xxxix. 437.

14. An easement may be extinguished by the lawful location and construction of a street, with its embankments and walls. *Muzzey v. Union Wharf*, xli. 34.

15. No right can be acquired to an easement merely as appurtenant to land, the existence of which easement is suspended at the time the title to the land is acquired. *Muzzey v. Union Wharf*, xli. 34.

16. At common law, an easement may be acquired upon the land of another, without proof that the owner has sustained damage. *Underwood v. N. W. S. Co.*, xli. 291.

See AQUATIC RIGHTS, 4.  
PRESCRIPTION.

## EMANCIPATION.

1. A minor's desertion of her father's home, does not constitute emancipation, so long as the father has not relinquished his right of control, nor consented that she should act for herself independently of the father. *Bangor v. Readfield*, xxxii. 60.

2. An arrival at the age of twenty-one years does not emancipate a child resident in his father's family, and *non compos mentis*. *Tremont v. Mt. Desert*, xxxvi. 390.

3. A minor son, allowed by his father to leave him and work for his own support, and contract for himself without interference, may acquire and hold property in his own right, and maintain actions at law respecting it, although he has never been emancipated. *Boobier v. Boobier*, xxxix. 406.

4. A minor child, of parents who are paupers, bound to service, by overseers of the poor, by written indentures, until twenty-one years of age, is not thereby emancipated. *Oldtown v. Falmouth*, xl. 106.

See PAUPER, 2, 3, 5, 42, 43, 54, 56.

## EMBEZZLEMENT.

By R. S. of 1841, c. 156, § 7, it is an offence, punishable in this State, if a person to whom property is intrusted, to be by him carried for hire and delivered in another State, shall fraudulently convert the same to his own use, before such delivery, whether the act of conversion be in this State or in another. *State v. Haskell*, xxxiii. 127.

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## ENTAILED ESTATES.

See DEVISE, &c.

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## EQUITY.

- I. JURISDICTION.
  - II. PRACTICE.
  - III. PLEADINGS.
  - IV. EVIDENCE.
  - V. GENERAL PRINCIPLES.
- 

## I. JURISDICTION.

1. Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where it was the testator's intention to make a specific devise a fund for the payment of a legacy, such legacy is a charge upon the devise; and a court of equity may decree, that the person in whom the estate is vested shall execute the trust. *Bugbee v. Sargent*, xxvii. 338.

2. A court of equity will assist a judgment creditor to discover and reach the property of his debtor, fraudulently transferred, although not liable to be attached upon a writ, or seized on execution, when the creditor has exhausted his remedy at law, without having recovered his debt. *Sargent v. Salmond*, xxvii. 539.

3. If one has received a conveyance fraudulent as to creditors, and the creditor takes a judgment for double the amount justly due to him, equity will not interfere to assist him in obtaining satisfaction of such judgment. *Sargent v. Salmond*, xxvii. 539.

4. Nor will the Court interfere where land has been fraudulently conveyed, if the grantee has received no benefit therefrom, and the title is still a matter of controversy, and of litigation between such grantee and a claimant of the property. *Sargent v. Salmond*, xxvii. 539.

5. This Court, as a court of equity, has power to compel the execution of any trust, whenever equity requires it. *Morton v. Southgate*, xxviii. 41. *Pratt v. Thornton*, xxviii. 355.

6. But in the case of testamentary trusts, the action of the Court is to be "subject to any provisions contained in the will;" and it is forbidden to "restrain the exercise of any powers, given by the terms of the will." *Morton v. Southgate*, xxviii. 41.

7. Where, by the will, a discretion is left to the judgment of the trustee, it is doubtful whether the Court can substitute its own judgment for that of the trustee. If it has the power, the proof should be of the fullest and clearest character. *Morton v. Southgate*, xxviii. 41.

8. A court of equity will aid an administrator of an insolvent estate, to obtain property conveyed by the intestate to defraud his creditors, for the purpose of appropriating the same to the payment of the debts of the estate; but it will not aid one or more creditors of said estate. *Caswell v. Caswell*, xxviii. 232. *Fletcher v. Holmes*, xl. 364.

9. The plaintiff in equity must exhaust his legal remedies to obtain his object, before equity can aid him. *Caswell v. Caswell*, xxviii. 232. *Fletcher v. Holmes*, xl. 364.

10. To reach property fraudulently conveyed, by a process in equity, it should appear that a judgment has been obtained, which cannot be impeached by the party to be affected by the relief sought; and that every lawful expedient has been done to obtain satisfaction of the same. *Caswell v. Caswell*, xxviii. 232. *Fletcher v. Holmes*, xl. 364.

11. When a party has materially improved an estate, under a belief, reasonably entertained, that he is the owner of the land, equity will aid the true owner to enforce his title, only on condition that such innocent person shall be fully compensated for the benefit conferred upon the owner. But it cannot be done to the prejudice of the owner. *Pratt v. Thornton*, xxviii. 355.

12. If the owner of land contracted to be conveyed, without fraudulent intent, after an attachment thereof, conveys the same to a third person, who takes it to defraud creditors of the debtor, a bill in equity may be maintained by the purchaser of the debtor's interest against the fraudulent grantee, to obtain a conveyance, without joining the original owner. *Whitmore v. Woodward*, xxviii. 392.

13. The authority of this Court to issue writs of injunction, is limited to the equity jurisdiction, given by the statute. *Smith v. Ellis*, xxix. 422.

14. While, between the joint owners of a vessel, no settlement has been made of her disbursements and earnings, and no balances have been ascertained and agreed upon, one part owner cannot maintain against another an action for his proportion of the net avails, although the vessel has been lost at sea. The usual process for such an adjustment is at equity. *Maguire v. Pingree*, xxx. 508.

15. If one purchases land, having knowledge of a previous contract by the grantor, to convey the same land to another, equity will compel the purchaser to convey the land in the same manner as would be required of his grantor. *Foss v. Haynes*, xxxi. 81.

16. If the design of such purchase was to place the land beyond the reach of the person entitled to the conveyance, and thereby to defeat his rights, a court of equity has jurisdiction on the ground of fraud. *Foss v. Haynes*, xxxi. 81.

17. The Court has jurisdiction, in equity, brought by a judgment creditor, which charges that the judgment debtor, one of the defendants, had fraudu-

lently, and without consideration, transferred his property to the other, under an agreed purpose to defraud the plaintiff. *Hartshorn v. Eames*, xxxi. 93.

18. If personal property has been conveyed for the purpose of deterring creditors of the vendor from attaching it, and concurred in by the vendee, it is a fraud, the remedy for which is equity. *Hartshorn v. Eames*, xxxi. 93.

19. If a person purchases land from one who had previously conveyed the same in mortgage, and then sells the same at different times, in separate parcels, to several purchasers, the portion last conveyed, if of sufficient value, may become chargeable, in equity, with the whole mortgage debt. *Shepherd v. Adams*, xxxii. 63.

20. And where, in such case, the last sold portion was of sufficient value to discharge the mortgage, and the purchaser thereof bought in the mortgage debt, took an assignment of the mortgage, and foreclosed the same; and then, under a claim of title to the whole tract, released to the purchaser of the first sold portion the assignee's right in this portion, upon being paid a sum of money:—*Held*, that said releasee could not recover back, in an action at law, the money, though paid under a belief that the releasor, when giving the release, had title to the whole tract; but that his remedy was in equity. *Shepherd v. Adams*, xxxii. 63.

21. The equity powers of this Court extend to the correction of mistakes in the christian names of legatees in a will. *Wood v. White*, xxxii. 340.

22. And in cases of waste, is confined to cases of technical waste; cases in which there is a privity of estate. *Leighton v. Leighton*, xxxii. 399.

23. Rights, claimed in cases in which the time agreed upon for the payment of money is not of the essence of the contract, can be enforced only in equity. *Hill v. Fisher*, xxxiv. 143.

24. Whatever rights are acquired by an auction purchase, under an attachment of an obligee's or his assignee's interest in a conditional bond for the conveyance of real estate, can be vindicated only by process in equity. *Houston v. Jordan*, xxxv. 520.

25. The grantor and grantee of land by a deed in form of a warranty, but by legal intendment merely an equitable mortgage, after the discharge of the mortgage, may be compelled in equity to release the estate to a person who had derived, under the grantor, a title legally subordinated only to such mortgage. *Howe v. Russell*, xxxvi. 115. But *vide* EQUITY, 40.

26. A bill in equity is not the proper process to bring the proceedings of selectmen, city councils, or county commissioners, in laying out streets, &c., before this Court, to obtain a decision whether such proceedings are in conformity to law. *Baldwin v. Bangor*, xxxvi. 518.

27. Where a party, in possession of land under a contract with the owner, has paid the purchase money, the land is held in trust for the benefit of the party in interest, and his rights may be obtained by proceedings in equity. *Roxbury v. Huston*, xxxvii. 42.

28. A second assignee, of an equitable title to real estate, is authorized to maintain a bill of equity in his own name, against one holding the same by a fraudulent title, to compel a conveyance. *Freeman v. Weld*, xxxviii. 313.

29. Where such assignee derives his interest by virtue of a levy, a deed to him of the land levied on, from the one holding the equitable title under such levy, is sufficient, without an assignment of the judgment. *Freeman v. Weld*, xxxviii. 313.



30. Upon the refusal of the promisor to fulfil a written agreement to convey real estate, the administratrix of the promisee may maintain a bill in equity for specific performance, or an action at law for damages. *Godfrey v. Dwinell*, XL. 94.

31. This Court has not general chancery powers. It has power, under the statute, to compel the specific performance of contracts in writing, made since Feb. 10, 1818. *Hayford v. Dyer*, XL. 245.

32. A bill not falling within the provisions of the statute, must be dismissed. *Hayford v. Dyer*, XL. 245. *Woodward v. Cowing*, XLI. 9. *Y. & C. R. R. Co. v. Myers*, XLI. 109.

33. Where an administrator attempts, through equity, to reach the avails of property belonging to the estate, fraudulently conveyed, it must appear:—

1st. That the suit is for the benefit of all the creditors whose claims are established:—

2d. That the creditors have obtained judgment, or that their claims have been allowed by the commissioners of insolvency, and not objected to by the administrator:—

3d. That the administrator has availed himself of the provisions of the law for citing before the Probate Court, the suspected parties:—

4th. That he has brought a suit at law for the recovery of the property so conveyed:—and—

5th. That he, or those whom he represents, has exhausted their remedy against the parties for aiding or assisting in fraudulently concealing the property of the estate. *Fletcher v. Holmes*, XL. 364.

34. The power of this Court to hear and determine in equity all cases of partnership, where the parties have not a plain and adequate remedy at law, is conferred by statute, and to that alone, the Court must look for its authority. *Woodward v. Cowing*, XLI. 9.

36. If a person, having a claim to land, and, with a full knowledge of his rights, suffers another in his presence, without making known his claim, to purchase of a third party, and expend money on the land, under an erroneous impression that he is acquiring a good title, he cannot, afterwards, in equity, enforce his legal rights against such purchaser. *Dixfield v. Newton*, XLI. 221.

37. While a man is legally *compos mentis*, though of weak mind, neither courts of law or equity will inquire into his wisdom, or want of it, in disposing of his property. *Hill v. Nash*, XLI. 585.

38. Where the parties in a bond, for the conveyance of real estate, agreed with the defendant, by parol, that he might have an interest in one-half of the bond, by making the first payment, and also to hold the title of the other half of the land, for security for money loaned them to make the payments for their moiety, by giving a bond to each of them to convey, by deed, one quarter of the premises on being reimbursed for his advances; and such payment was made, and the title to the land transferred to the defendant; in a suit in equity, to compel performance of said contract:—*Held*, that this Court had no jurisdiction to enforce it. *Hunt v. Roberts*, XL. 187.

39. A written contract, by which one agrees to do a certain act for the benefit of another, or to pay a certain sum, as he may elect, is not a case within the jurisdiction of this Court, as a court of equity; there being an adequate remedy at law. *Fisher v. Shaw*, XLII. 32.

40. From the limited equity powers of this Court, a deed, absolute and unconditional in its terms, cannot be regarded as a mortgage, although, in

fact, made to secure the payment of a loan. *Richardson v. Woodbury*, XLIII. 206.

41. Bills which seek a discovery only, in aid of an action at law, cannot be entertained by this Court, as its jurisdiction is limited by statute to cases in which it can give relief, and to those in which the power to require a discovery is specially given. *APPLETON, J.*, non-concurring. *Warren v. Baker*, XLIII. 570.

42. It is well settled, that relief consequent upon discovery ought not to be given, when the most appropriate proceeding to ascertain the extent of the relief is by the verdict of a jury. *Warren v. Baker*, XLIII. 570.

## II. PRACTICE.

43. The rules of set-off, in courts of general chancery jurisdiction, cannot prevail in this State, when at variance with our statute provisions on that subject. *Smith v. Ellis*, XXIX. 422.

44. A compensation in damages, for the breach of an agreement to convey real estate, is not regarded as adequate relief; but the Court will universally decree a specific performance. *Foss v. Haynes*, XXXI. 81.

45. Though a defendant in equity is not bound to criminate himself, or furnish evidence, by which a criminal accusation can be sustained, he may be compelled to make a discovery of any act, which does not amount to a public offence, or an indictable crime, although it may be one of great moral turpitude. *Foss v. Haynes*, XXXI. 81.

46. Where real estate, to which the fraudulent debtor had only an equitable title, is transferred by his procurement to another, cognizant of the design, it cannot be levied by a creditor. But, if the creditor's execution is returned *nulla bona*, a suit in equity, against the fraudulent grantee, will give him a lien upon the avails of it. *Hartshorn v. Eames*, XXXI. 93.

47. Upon a bill in equity, praying for an injunction, an Act of the Legislature will not be adjudged unconstitutional, on the preliminary hearing, and before an examination into the general merits of the bill. And it was held that, until the general merits should be examined, the injunction must be denied. *Deering v. Y. & C. R. R. Co.*, XXXI. 172.

48. The obtaining of a conveyance of land upon a verbal promise, that the purchaser would subsequently secure the purchase money by a mortgage, and a refusal so to do, are not sufficient for enjoining the purchaser from selling the land, unless some fraudulent or deceptive practice were used to obtain the conveyance. *Ellsworth v. Starbird*, XXXII. 176.

49. Where, in a conveyance of land, a boundary is described in the language intended to be used, though under a misapprehension as to its construction and effect, a court of equity can make no correction. *Farley v. Bryant*, XXXII. 474.

50. When a plaintiff in equity, to obtain relief, must have a decree against a defendant, he cannot use the testimony of that defendant, against the other defendants. *Farley v. Bryant*, XXXII. 474.

51. A defendant in equity cannot use a co-defendant as a witness, to prevent the obtaining of a decree against them both. *Farley v. Bryant*, XXXII. 474.

52. To a bill in equity, setting forth the facts upon which the plaintiffs relied, together with the law, three of the defendants did not appear; three

others made no answer; and the remaining thirteen filed their answers, and agreed with the plaintiffs to submit the action, with its subject matter, to referees. On motion to accept the award:—*Held*,—

That those who agreed to the submission and were heard, knowing that others had not concurred, waived their objection to the non-concurrence;—and—

That it was competent for the referees to attach to the facts proved their legal consequences, although at variance with the law alleged in the bill. *Smith v. Virgin*, xxxiii. 148.

54. In equity, all persons in interest, and within the jurisdiction, and capable of being parties, must be made such, before the decree. *Miller v. Whittier*, xxxiii. 521. *Bailey v. Myrick*, xxxvi. 50.

55. At the hearing upon bill, answer and proof, one in interest, who has never appeared or been cited to appear, may be summoned in and made a party, upon motion, and without a supplemental bill. And the terms, upon which such motion will be granted, may be adjudged at a subsequent stage. *Miller v. Whittier*, xxxiii. 521.

56. If the answer of the mortgagee shows information to have been received by him from the mortgager, that the right of redemption has been assigned to a third person, such third person must be made a party. *Bailey v. Myrick*, xxxvi. 50.

57. In cases of exceptions to a master's report on a bill in equity, it belongs to the excepting party to open and close. *Howe v. Russell*, xxxvi. 115.

58. It is unusual to allow an amendment to the defendant's answer; and such amendment will not be allowed, if it introduce new ground of defence, existing and known to the defendant, when he filed his answer. *Howe v. Russell*, xxxvi. 115.

59. A party claiming land under a tax title, must prove the facts necessary to establish its validity in equity as well as at law. *Howe v. Russell*, xxxvi. 115.

60. A master in chancery, commissioned to ascertain the amount due upon an outstanding mortgage of land, has no jurisdiction to adjudicate upon the titles to the estate mortgaged. *Howe v. Russell*, xxxvi. 115.

61. His adjudication, upon facts submitted to him, is presumed to be correct. And to set it aside, or reconsider it, for an alleged mistake or abuse of authority, it must be clearly shown that such wrong existed, and that equity requires its correction. *Howe v. Russell*, xxxvi. 115.

62. He is not bound to report the evidence. And his errors of computation may be corrected by the Court, without a re-commitment, either before or after the confirmation of his report. *Howe v. Russell*, xxxvi. 115.

63. The adjudication of the Judge, at the *Nisi Prius* hearing, as to the facts, is conclusive. *Gilmore v. Patterson*, xxxvi. 544. *Morris v. Day*, xxxvii. 386. *Dwinel v. Perley*, xxxviii. 509.

64. Exceptions to the report of a master, to avail, must either be supported by the special statements in the report, or by the production of the evidence on which they rest. *Miller v. Whittier*, xxxvi. 577.

65. When an agent, in the possession and improvement of an estate, neglects to keep an accurate account of the income and expenditures thereof, the master may reject the account presented by the trustee, and exercise a sound discretion upon the whole evidence before him, in charging the trustee with

the income, and allowing him such charges and disbursements, as shall appear reasonable. *Miller v. Whittier*, xxxvi. 577.

66. Where parties to a bill, at the time of making their contract, recognized the existence of a debt due from one to the other, the consideration of that debt cannot afterwards be a subject of inquiry. *Miller v. Whittier*, xxxvi. 577.

67. In equity, the facts proved, the questions of law arising thereon, the decision of the same, and the decree of the presiding Judge, must all be reported. *Morris v. Day*, xxxvii. 386.

68. No question of law, not arising out of the facts proved and reported, can be argued or decided by the Court. And whether the decree of the presiding Judge shall be affirmed, or any different order made, must be determined from the facts proved and reported. *Morris v. Day*, xxxvii. 386. *Dwinel v. Perley*, xxxviii. 509.

69. When the respondent is attempting to enforce the rights of an owner of the land in controversy, he may be required to release all his claims thereto, although he may have previously conveyed them to a third person. *Dwinel v. Perley*, xxxviii. 509.

70. Where the claims set up by one party are resisted on the ground of fraud, and the Court judicially determine in favor of such claims, and the case is sent to a master to find the amount due, he cannot reëxamine the question of fraud. *Gilmore v. Gilmore*, xl. 50.

71. He can only consider such legal evidence, had at the hearing, as is material to the question submitted to him. *Gilmore v. Gilmore*, xl. 50.

72. Before a court of equity will interfere to afford relief, as by declaring a conveyance void for fraud, plaintiff must show that he has an interest in the estate conveyed, by levy or otherwise, or in other subject matter to which the bill relates. *Dana v. Haskell*, xli. 25.

73. A bill in equity will not be dismissed for want of prosecution, where the delay occurs after the appointment of a master to take the testimony, and before his report, when the party complaining has made no effort to obtain an earlier publication of the proofs. *Warren v. Shaw*, xliii. 429.

74. During such time, the case is suspended in Court; and if the master improperly delays to report, it is no more the fault of the plaintiff than of the defendant. *Warren v. Shaw*, xliii. 429.

75. And where the defendant filed a rule to show cause why the bill should not be dismissed for want of prosecution, it may well be doubted, whether the subsequent prosecution of the suit, without objection, may not be considered a waiver. *Warren v. Shaw*, xliii. 429.

See MORTGAGE, 10.

### III. PLEADINGS.

76. A demurrer cannot be good as to a part which it covers, and bad as to the rest; the whole must stand or fall. *Burns v. Hobbs*, xxix. 273.

77. In a bill for discovery and to set aside a mortgage, which the plaintiff alleges was taken by the defendant with intent to defraud the plaintiff, the defendant cannot, by demurring to the bill, avoid answering and disclosing the time when his mortgage was executed; whether he claims to hold the

land by virtue of it; or disclosing, and, if in his power, producing the note secured by the mortgage; or from stating when, where, and in whose presence and for what, the note was given; or from whom the consideration was received, and to whom paid. *Burns v. Hobbs*, xxix. 273.

78. *It seems*, a bill, which alleges that land conveyed by a deed without consideration was taken in trust by the grantee, need not set forth the manner in which the trust is to be proved; and that, therefore, a demurrer on such grounds may be set aside to let in proofs of the trust. *Philbrook v. Delano*, xxix. 410.

79. After the assignment of all interest in a chose in action, upon which a claim in equity is founded, the bill must be brought in the name of the assignee; and the assignor need not be a party. *Haskell v. Hilton*, xxx. 419. *Miller v. Whittier*, xxxii. 203. *Moor v. Veazie*, xxxii. 343.

80. A total want of legal or equitable interest in the plaintiff in equity, is fatal to the bill; and the objection may be taken by demurrer, or at the hearing. *Haskell v. Hilton*, xxx. 419.

81. Where an assignment of real estate has been made for the benefit of creditors, it is not requisite, in a bill in equity against the assignee relative to the property assigned, that the creditors should be made parties. *Johnson v. Candage*, xxxi. 28.

82. A bill is not rendered multifarious, by joining two good causes of complaint, growing out of the same transaction, when all the defendants are interested in the same claim of right, and when the relief asked for, in relation to each, is of the same general character. *Foss v. Haynes*, xxxi. 81.

83. A bill, which charges that the judgment debtor, one of the defendants, had fraudulently, and without a valuable consideration, transferred his property to the other, under an agreed purpose between them to defraud the plaintiff, is not demurrable. *Hartshorn v. Eames*, xxxi. 93.

84. Where a fraudulent transfer is alleged to have taken place at a particular time, it is unnecessary to aver, that the fraud continued and existed at the time of filing the bill; but if the property, subsequently to the fraud, went into the hands of *bona fide* creditors, that must appear in defence. *Hartshorn v. Eames*, xxxi. 93.

85. Whether a fraud can be so purged, in that way, as to deprive a creditor of his remedy; *quere*. *Hartshorn v. Eames*, xxxi. 93.

86. To authorize the Court to reform a deed upon the allegation of a mistake, the mistake must be precisely alleged and clearly proved. *Farley v. Bryant*, xxxii. 474.

87. A tenant of one who holds land subject to the maintenance of a person, in accordance with a bond, is properly made a party to a bill, brought by such person to enforce her claim. *Pike v. Collins*, xxxiii. 38.

88. In a bill to reform a conveyance, for accident or mistake, the persons, under whom the defendant claims by deeds of warranty, made since the accident or mistake is alleged to have occurred, must be made parties. *Davis v. Rogers*, xxxiii. 222.

89. The bill is defective, unless it contain an allegation that the grantees in such deeds purchased with notice of the mistake or accident. *Davis v. Rogers*, xxxiii. 222.

90. Where the plaintiff was jointly interested with another in a bond for the conveyance of real estate, the conditions of which had been fulfilled, and his assignee in bankruptcy, under a license, had sold his interest to defend-

ant, who had obtained a deed from the obligors, and plaintiff claimed that his interest in the bond had been previously assigned as security to a creditor, (from whom he derived a subsequent title,) and that no right had vested in his assignee in bankruptcy:—*Held*, that unless his bill, seeking to compel a conveyance of such half, sets forth the assignment to his creditor to have been perfected *before* his petition to be decreed a bankrupt, it cannot be maintained. *Perley v. Dole*, xxxviii. 558.

91. The rules of this Court, in chancery practice, require the bill to set forth clearly, succinctly and precisely, the facts and causes of complaint. But amendments may be allowed on terms. *Boynton v. Brastow*, xxxviii. 577.

92. The general rule in equity is, that all persons legally or beneficially interested in the subject matter of a suit, should be made parties thereto. *Morse v. M. W. P. & M. Co.*, xlii. 119.

See ACTION, 6.

ASSIGNMENT, 10.

EQUITY, 94, 95, 96.

#### IV. EVIDENCE.

93. Where, by the will, a discretion and option is given, to be exercised according to the judgment of a trustee, it is very doubtful whether the Court can substitute its own judgment for that of the trustee. If it can, the proof should be of the fullest and clearest character. *Morton v. Southgate*, xxviii. 41.

94. In a suit in equity, for the purpose of avoiding a conveyance by the deceased debtor, the grantee may impeach the judgment, which is the foundation of the suit, if such judgment was unlawfully obtained; and this may be done by plea and proof. *Caswell v. Caswell*, xxviii. 232.

95. And if the judgment has been laid before the commissioners of insolvency and allowed, and their report has been accepted, such report may be impeached in the same manner. *Caswell v. Caswell*, xxviii. 232.

96. Where an action was demurred from the District Court to this Court, and an erroneous judgment was entered for the plaintiff by consent, when on the pleadings, which by agreement might be waived, the defendant was entitled to judgment; and it was entered in this Court, and the action continued, and then dismissed because no legal recognizance had been taken, and thereupon judgment was rendered in the District Court for the plaintiff, without any appearance for, or notice to, the defendant, or any change in the pleadings:—*Held*, such judgment might be impeached by one injuriously affected thereby, and not a party or privy thereto. *Caswell v. Caswell*, xxviii. 232.

97. The lapse of many years between a conveyance of *improved* land, and an application to have the deed reformed, for an alleged mistake in the description of the land, would impose a serious dissuasive upon the Court. But in relation to *unimproved* lands, and especially where the occupation of the grantee and his assigns has indicated no claim under the description, it would be otherwise. *Farley v. Bryant*, xxxii. 474.

98. Proofs of mistakes in deeds may be established by parol. *Farley v. Bryant*, xxxii. 474.

99. In such cases, the evidence from applying the description in the deed to the marks, monuments and reservations upon the face of the earth, thereby to discover its agreement or disagreement therewith, is entitled to great consideration. *Farley v. Bryant*, xxxii. 474.

100. So is the fact whether the grantees and their assigns have or have not, in their management of the land, conducted as if considering the disputed land to have been yet unconveyed by the deed to them. *Farley v. Bryant*, xxxii. 474.

101. Though the proof, to overcome an answer in chancery, must be equivalent to the testimony of two credible witnesses, yet it need not be direct and positive. *Farley v. Bryant*, xxxii. 474.

102. Allegations, in an answer to a bill in equity, are not of themselves evidence, unless responsive to the bill. *Buck v. Swazey*, xxxv. 41. *Gilmore v. Patterson*, xxxvi. 544.

103. A party, claiming land under a tax title must prove the facts necessary to establish its validity in equity as well as law. *Howe v. Russell*, xxxvi. 115.

104. So far as a defendant's answer is responsive to the bill, or explanatory of the responsive matter in the bill, it is evidence. *Gilmore v. Patterson*, xxxvi. 544.

105. It is a general rule, that the answer of one defendant is not evidence for his co-defendant. *Gilmore v. Patterson*, xxxvi. 544.

106. The admissions of one co-partner, with reference to the legitimate business of the co-partnership, are deemed to be the admissions of each and all of its members, even when found in an answer to the bill under consideration by the Court. *Gilmore v. Patterson*, xxxvi. 544.

## V. GENERAL PRINCIPLES.

- (a) TRUST.
- (b) FRAUD.
- (c) BILLS FOR SPECIFIC PERFORMANCE.
- (d) BILLS TO REDEEM.
- (e) OTHER CASES.

### (a) Trust.

107. No trust, of which a court of equity can take cognizance, results merely from the want of consideration for a deed. *Philbrook v. Delano*, xxix. 410.

108. Mere want of consideration will not create a resulting trust. *Philbrook v. Delano*, xxix. 410.

109. Where the several debts, secured by a mortgage, have become the property of different persons, and the assignee of the mortgage has foreclosed, he holds the property, with the rents and profits thereof, in trust for the holders of the debts, according to their respective amounts. *Johnson v. Candage*, xxxi. 28.

110. Such a mortgage, and a part of the notes secured by it, were assigned to the defendant, who foreclosed. When taking the assignment, he knew that one of the notes was held by another:—*Held*, that such holder could recover, in equity, his proportionate part of the mortgaged property, and of its rents and profits. *Johnson v. Candage*, xxxi. 28.

111. The execution of such a mortgage, and notes, is a sufficient compliance with c. 91, § 31, R. S., 1841, that trusts concerning lands shall be created and manifested in writing. *Johnson v. Candage*, xxxi. 28.

112. After the death of the husband, and a foreclosure, by the administrator of the mortgage, given to secure a bond to the husband and wife for maintenance, the administrator, and those holding by purchase under him, will hold the land, charged with the maintenance of the widow, in proportion to their respective parts. The liabilities of such holders commence from the time of their respective purchases. *Pike v. Collins*, xxxiii. 38.

113. The husband may be trustee of the wife, and the trust may be enforced, as if he were a stranger; and his representatives are subject to the same liability. *Pike v. Collins*, xxxiii. 38.

114. If part of a debt, secured by mortgage of land, be held in trust, the trust will not be dislodged, by a written agreement of the trustee "to account and pay over, to the *cestui que trust*, his proportion of any moneys which may be received upon the debt." And such trust is assignable, and may be enforced in equity by the assignee. *Buck v. Swazey*, xxxv. 41.

115. Where one having, as *cestui que trust*, the right to compel a conveyance of land to him by his trustee, becomes himself by contract the trustee of another in the same land, he is compellable to convey to his *cestui que trust*, as soon as he shall obtain a conveyance. *Buck v. Swazey*, xxxv. 41.

116. To avoid circuity of action, the first trustee may be compelled to convey directly to the last *cestui que trust*. And such a conveyance will protect the first trustee from the claims of his immediate *cestui que trust*. *Buck v. Swazey*, xxxv. 41.

117. A trustee of real estate, when required by a court of equity to convey to the *cestui que trust*, is bound to insert a covenant of warranty against persons claiming under himself. *Dwinel v. Veazie*, xxxvi. 509.

118. Where there is a fault on the part of the owner in not complying with his contract, although no proper account has been kept by the trustee, he is not chargeable with the utmost that might have been made out of the estate. *Miller v. Whittier*, xxxvi. 577.

119. Upon the sum acknowledged to be due at a time specified, between the *cestui que trust* and trustee, interest may legally be allowed. *Miller v. Whittier*, xxxvi. 577.

See MORTGAGE, 132.

TRUSTS.

#### (b) *Fraud.*

120. Although one of the defendants, when purchasing property, was a *bona fide* creditor of the other defendant, from whom he purchased it, yet, if his real object was, not to obtain payment of his debt, but to give the colorable appearance of a sale, the purchase would be fraudulent in equity, as against creditors. *Hartshorn v. Eames*, xxxi. 93.

121. If personal property has been conveyed for the purpose, concurred in by the vendee, of deterring creditors of the vendor from attaching it, such conveyance is fraudulent, and the remedy is in equity. *Hartshorn v. Eames*, xxxi. 93.

122. Any one of the purchasers of land by the same deed, though in unequal proportions, who have given their several notes for each one's share of the purchase money secured by a joint mortgage of the tract, *without the concurrence of the others*, may set aside the mortgage as to himself, by bill in



equity, if the purchase of the land was procured by fraudulent representations of the grantor. *Moulton v. Low*, xxxii. 466.

123. But the relations between him and the other purchasers could not authorize him to prosecute bills in their names, and without their consent, to rescind the trade as to them. *Moulton v. Low*, xxxii. 466.

See MORTGAGE, 132.

FRAUD.

(c) *Bills for specific performance.*

124. Where, in a bond, conditioned to convey land upon the payment of a note, there was inserted the clause: — “in case the obligee shall neglect or refuse to pay the note according to its tenor, the bond shall be void;” and it was proved that the obligee was intending to pay it, but, that before, and at, and a few weeks after, the pay-day, sickness prevented his attending to any business affairs, and that, upon his recovery, he sought permission of the obligor to pay it; — *Held*, a specific performance should be decreed, a tender having been made prior to the suit. *Jones v. Robbins*, xxix. 351.

125. A compensation in damages, for the breach of an agreement to convey real estate, is not regarded as adequate relief; but the Court will universally decree a specific performance. *Foss v. Haynes*, xxxi. 81.

126. One, bound to convey land upon the performance by another of certain precedent conditions, exonerates the obligee from the performance, prior to instituting a bill for relief, by purposely incapacitating himself to make the conveyance. *Miller v. Whittier*, xxxii. 203.

127. If a person, after having purchased a mortgage debt, receive funds from another person, and contract in writing to pay him a specified part of the proceeds of the debt when received, *and in manner as received*, a specific performance may be enforced in equity, although there may be a remedy at law. *Buck v. Swazey*, xxxv. 41.

128. An agreement in writing, to procure for the plaintiff a good and sufficient deed of land, the title of which is not in the respondent, which was known to the plaintiff, lays no foundation for the Court to decree a specific performance. *Hill v. Fisk*, xxxviii. 520.

129. Nor in such case will a court of equity retain jurisdiction to give compensation in damages for the breach. *Hill v. Fisk*, xxxviii. 520.

130. The specific performance of a written contract, concerning land, cannot be decreed in a court of equity, if the description of the land is so vague and uncertain as to require parol evidence to ascertain its boundaries. *Jordan v. Fay*, xl. 130.

131. A written agreement to sell certain tracts of land, signed by each party thereto, *remaining in the hands of the vendor*, with a further agreement by him to deliver to the other a duplicate, on payment of a certain sum, at a fixed time, is valid in equity, on payment thereof according to the terms; and on fulfillment of its conditions by the vendee, specific performance may be required. *Hull v. Noble*, xl. 459.

132. This Court has equity jurisdiction in all suits to compel the specific performance of contracts in writing, &c., when the parties have not a plain and adequate remedy at law. *Fisher v. Shaw*, xlii. 32.

133. If the contract appears only in the condition of a bond secured by a

penalty, the Court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty. *Fisher v. Shaw*, XLII. 32.

134. A bond for the payment of money, conditioned to be void on the payment of land, will be treated as an agreement to convey, and will be specifically enforced as against the obligor. *Fisher v. Shaw*, XLII. 32.

135. A., having become the assignee of a mortgage, and, by foreclosure thereof, the sole owner of the mortgaged premises, agreed, by contract under seal, to relinquish to B. all his title thereto, upon payment by B. of a certain sum. No actual consideration was paid for the agreement, and it was afterwards voluntarily surrendered to A. by B., for the reason that the latter was not able to pay the amount required:—*Held*, that the voluntary surrender was void as against creditors, B. being at the time insolvent; and C., by the seizure and sale of B.'s interest after such surrender, acquired a right to the conveyance from A., which this Court, as a court of equity, will compel after a proper tender. *Neil v. Tenney*, XLII. 322.

136. Where the prayer in a bill is, that reconveyance be ordered and decreed, although there may have been concealment and fraudulent representations on the part of the respondent in obtaining a conveyance; yet, while the complainants hold a bond, given in consideration of the same, they cannot sustain a bill for such reconveyance without having discharged, or having offered to discharge, such bond. Nor until all the parties interested in the estate and bond have been notified, and become parties to the suit. *Dockray v. Thurston*, XLIII. 216.

137. A division of an estate, according to the hereditary rights of the heirs, cannot be made in the absence of those whose rights are to be determined by such division. *Dockray v. Thurston*, XLIII. 216.

#### (d) *Bills to redeem.*

138. A bill in equity to redeem real estate, levied on execution, must be commenced in season to have the amount ascertained and brought into Court, before the year, allowed for the redemption, has expired. *Boothby v. B. C. Bank*, XXX. 361.

See MORTGAGE, 94–110.

#### (e) *Other cases.*

139. In a bond or written agreement to convey land upon the payment of a note, time is not considered, in equity, to be of the essence of the contract, unless it is so expressly agreed, or it follow from the nature and purposes of the contract. *Jones v. Robbins*, XXIX. 351. *Hull v. Noble*, XL. 459.

140. Generally, in such contracts, the time of payment is regarded as formal, and as meaning only that the purchase shall be made within a reasonable time, and substantially according to the contract, regard being had to all the circumstances. *Jones v. Robbins*, XXIX. 351. *Hull v. Noble*, XL. 459.

141. The clause:—"in case the obligee shall neglect or refuse to pay the note according to its tenor, the bond shall be void," does not make time the essence of the bond. *Jones v. Robbins*, XXIX. 351.

142. One, seeking relief from a forfeiture, must show, that circumstances,

which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived. *Jones v. Robbins*, xxix. 351. *Hull v. Noble*, xl. 459.

143. Thus, proof of an intention to pay the note at its maturity, but the sickness of the obligee, before, at, and a few weeks after, the pay-day, which prevented his attending to any business, and that upon his recovery, he sought permission of the obligor to pay it, was held sufficient excuse. *Jones v. Robbins*, xxix. 351.

144. A deed of land will not be reformed, upon a bill in equity, for a mistake in its boundaries, to the injury of one who has purchased of the grantee in good faith, and without notice. *Whitman v. Weston*, xxx. 285.

145. If a person purchases land from one who had previously conveyed the same in mortgage, and then sells the same, at different times, in separate parcels to several purchasers, equity may charge the portion last conveyed, if of sufficient value, with the whole mortgage debt. *Shepherd v. Adams*, xxxii. 63.

146. One, bound to convey land upon certain conditions precedent, exonerates the obligee from their performance, prior to instituting a bill for relief, by purposely incapacitating himself to make the conveyance. *Miller v. Whittier*, xxxii. 203.

147. By articles of agreement between members of an unincorporated association, it was stipulated, that the capital stock should be divided into shares; that the shares should be transferable; and that trustees should be appointed, in whom all the property should vest in trust. Accordingly, trustees were appointed; purchased real and personal estate, and proceeded to the transaction of business. Shares were from time to time transferred, until twenty-nine-fortieths of them were held by one person:—*Held*, that a sale by him, not of his shares, but of twenty-nine-fortieths of all the land and property which had belonged to the company, was a dissolution of the association; and that those, who owned the shares at the time of the dissolution, were entitled, according to the number of their shares, to all the avails and assets of the company, and liable to contribute, in the same proportions, to all the debts of the company. *Smith v. Virgin*, xxxiii. 148.

148. After the payment is made to entitle the party to a duplicate, no demand of it is essential to vindicate his rights under it. *Hull v. Noble*, xl. 459.

149. It is a reasonable excuse for not fulfilling the conditions of a sale of real estate, as to the time of payment, by the party seeking a specific performance, that a duplicate of the written contract was withheld from him by the other party, after he was entitled to its possession. *Hull v. Noble*, xl. 459.

150. In equity, where there is a tenant in possession under a lease or agreement, a person purchasing part of the estate must be bound to inquire, on what terms that person is in possession. *Hull v. Noble*, xl. 459.

151. To reform a levy duly recorded, and deeds consequent on the levy, thereby changing existing titles, would render the registry of deeds of little value, and it cannot be done. *Lumbert v. Hill*, xli. 475.

152. In cases of relief, by correcting mistakes in the execution of instruments, the party asking relief must stand upon some equity superior to that of the other party. If the equities are equal, a court of equity is silent and passive. *Lumbert v. Hill*, xli. 475.

153. If a party trusts to an invalid contract, a court of equity can grant him no relief against the other party for treating the contract as the law regards it. *Fisher v. Shaw*, XLII. 32.

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## ERROR.

### I. IN WHAT CASES IT WILL LIE. II. PROCEEDINGS.

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#### I. IN WHAT CASES IT WILL LIE.

1. It is generally true that an erroneous judgment is to be avoided only by a writ of error. *Caswell v. Caswell*, XXVIII. 232.

2. Where an error is manifest upon the face of the proceedings, the judgment is erroneous in law; an error in law must appear by the record itself. *Smith v. Rhodes*, XXIX. 360. *Valentine v. Norton*, XXX. 194. *McArthur v. Starret*, XLIII. 345.

3. A judgment rendered against an administrator, within twelve months from his assuming his trust, for demands affected by the insolvency of the estate, and not by way of appeal from the decision of the commissioners of insolvency, is erroneous, and may be reversed. *Smith v. Rhodes*, XXIX. 360.

4. Error will not lie to obtain relief from an illegal taxation of costs, when assigned as error in law. *Valentine v. Norton*, XXX. 194. *McArthur v. Starret*, XLIII. 345.

5. When error is not apparent upon the record, it is one of fact. *Valentine v. Norton*, XXX. 194. *McArthur v. Starret*, XLIII. 345.

6. A judgment recovered by an administratrix, for the misfeasance of a sheriff or his deputy, committed in the lifetime of her intestate, is reversible on error. *Valentine v. Norton*, XXX. 194.

7. Where, upon a writ of error, it does not appear, but that the original action might have been maintained, though there is error in the proceedings, the judgment must be reversed, but a new trial will be ordered. *Crawford v. Howard*, XXX. 422.

8. A judgment rendered against a corporation, after a dissolution of it by an Act of the Legislature, is erroneous. *Merrill v. Suffolk Bank*, XXXI. 57. *Rankin v. Sherwood*, XXXIII. 509.

9. Error does not lie to reverse a judgment of a justice of the peace, if the plaintiff in error had an opportunity to appeal if he had jurisdiction. *Howard v. Hill*, XXXI. 420. *Jewell v. Brown*, XXXIII. 250.

10. A denial to allow costs to the exact amount claimed, when some amount is allowed, is not error in law. *Reed v. Tay*, XXXII. 173.

11. Want of legal service of the writ, is a sufficient cause for reversing a judgment recovered on default. *Wilton M. Co. v. Woodman*, XXXII. 185.

12. Chapter 115, § 96, of R. S. of 1841, being prospective only, it was not erroneous to allow cost in an action upon a judgment, commenced within the time when an execution might have been issued thereon, although such

action did not come to judgment until after the R. S. had taken effect. *Withee v. Preston*, xxxiii. 211.

13. A judgment may be reversed, when rendered by a justice of the peace, of one county, the defendant's residence being in another county of the State. *Jewell v. Brown*, xxxiii. 250.

14. In *indebitatus assumpsit* upon an account annexed, if the account annexed is against a third person, and not against the defendant, it is error. *Jewell v. Brown*, xxxiii. 250.

15. Error does not lie to reverse a judgment of the District Court, rendered upon default, if the action was in its nature appealable, and if no cause be shown why the defendant did not appear and answer. *Lord v. Pierce*, xxxiii. 350.

16. Since R. S. of 1841, have been in force, no judgment can be "reversed for any want of form which might have been amended. *Lord v. Pierce*, xxxiii. 350.

17. A judgment, rendered by a justice of the peace before the day at which the defendant was summoned to attend, is erroneous and reversible. *Crosby v. Boyden*, xxxiii. 368.

18. A judgment against the accused under Act of 1851, c. 11, § 11, is reversible for error, if neither the complaint nor the judgment shows, that the liquors were intended for sale in the city, town or place where they were kept or deposited. *Barnett v. State*, xxxvi. 198.

19. The rule that a writ of error will not lie where an appeal might have been taken without laches, does not apply to criminal cases. *Barnett v. State*, xxxvi. 198.

20. A judgment may be reversed on writ of error, for an error of law or fact; but in either case, it must be shown that it was such an error as existed without the fault, or legal capacity of the party injuriously affected by it, to prevent it. *McArthur v. Starret*, xliii. 345.

## II. PROCEEDINGS.

21. When errors of fact are assigned for the reversal of a judgment, a plea of "*in nullo est erratum*," admits the truth of the facts assigned. *Smith v. Rhodes*, xxix. 360.

22. When the error assigned is one of law, there is nothing upon which the Court can act, except the transcript of the record. Documents and papers filed in the case form no part of the record, unless incorporated into it. *Valentine v. Norton*, xxx. 194. *Paul v. Hussey*, xxxv. 97. *Starbird v. Eaton*, xlii. 569.

23. If a judgment, recovered against a corporation, after its dissolution, has been satisfied out of the estate of one who had been a stockholder in the corporation, he is a privy in law to the judgment; and, without joining the co-stockholders, may bring a writ of error in his own name. *Merrill v. Suffolk Bank*, xxxi. 57. *Rankin v. Sherwood*, xxxiii. 509.

24. Nothing which contradicts the record can be alleged as error. *King v. Robinson*, xxxiii. 114. *Paul v. Hussey*, xxxv. 97.

25. When, from the usual course of proceeding in court, the law allows a departure under a prescribed condition, an assignment of errors, based upon

the departure, must negative the performance of the condition. *Dunlap v. Atkinson*, xxxiii. 265.

26. Proof that the condition was not performed, will not aid the defective assignment. *Dunlap v. Atkinson*, xxxiii. 265.

27. At common law, the joinder of errors of law and fact was not permitted; but such joinder is now authorized by the Act of 1852, c. 269, § 3. *Starbird v. Eaton*, xlii. 569.

## ESTATES ON CONDITION.

See GRANTS BY THE SOVEREIGN POWER.

## ESTATES TAIL.

See DEVISE.

## ESTOPPEL.

- I. BY DEED OR OTHER SPECIALTY.
- II. BY PAROL, OR IN PAIS.

### I. BY DEED OR OTHER SPECIALTY.

1. Where a mortgage of lands, of which the mortgager has no recorded title, is made (and recorded) to him who is the absolute owner thereof by the records, and the mortgagee assigns to another "all his right, title and interest in and to the within mortgaged premises," and this assignment is also recorded; such record must be regarded as notice of such assignment; and such mortgagee, and those under him, as after attaching creditors or purchasers, are estopped to deny the title of the assignee by virtue of the mortgage. *Pierce v. Odlin*, xxvii. 341.

2. Where land is conveyed by defendant to plaintiff, by deed of warranty, and, at the same time, reconveyed in mortgage, with like covenants, to secure the whole or a part of the purchase money; and, afterwards, the plaintiff, being evicted of a portion of the premises, sues the defendant upon his covenant of warranty, the money secured by the mortgage still remaining unpaid:—*Held*, that the plaintiff is not estopped by the covenants in his mortgage from showing a defect in the defendant's title, or precluded thereby from maintaining the action. *Hardy v. Nelson*, xxvii. 525. *Brown v. Staples*, xxviii. 497.

3. Where two grantors conveyed land, by deed of warranty, without de-

signating the manner in which it was held by them, and, one of the grantors having died, his widow brought her action of dower in one half of the premises granted:—*Held*, that the grantee was estopped from denying, that the living grantor was seized in severalty of a larger proportion, and the deceased of a less one, than an undivided moiety. *Stimpson v. Thomaston Bank*, xxviii. 259.

4. A covenant of warranty does not include an incumbrance which the grantee, by an instrument of as high a nature as the deed, has engaged to discharge; and the grantee, cannot therefore, nor can a second grantee with notice, enforce such covenant as an estoppel, against a covenant of warranty, by himself, of the same premises to his grantor. *Brown v. Staples*, xxviii. 497.

5. Where a deed was made by an attorney, and the proprietor took back a mortgage and notes, and the mortgage and notes did not refer specifically to the deed, and contained nothing inconsistent with the attorney's want of authority:—*Held*, that the mortgagee was not estopped to deny that the title passed to the mortgager, by the attorney's deed. *Spofford v. Hobbs*, xxix. 148.

6. Where one has conveyed land by deed of warranty, a subsequently acquired title will enure to the grantee; and the grantor, and those claiming under him, will be estopped to deny it. *Pike v. Galvin*, xxix. 183. *Crocker v. Pierce*, xxxi. 177. *Hill v. More*, xi. 515.

7. If, however, the deed contain no covenant of warranty, it is otherwise, unless by so doing, he is obliged to deny or contradict some fact alleged in his former conveyance. *WELLS, J.*, dissenting. *Pike v. Galvin*, xxix. 183. *Crocker v. Pierce*, xxxi. 177.

8. Where the creditor levies upon land to which his judgment debtor had no title, the debtor is not estopped to assert a subsequently acquired title. *Freeman v. Thayer*, xxix. 369. *Crocker v. Pierce*, xxxi. 177.

9. A married woman, who joins her present husband in a conveyance of real estate, by relinquishing her right of dower therein, is estopped to claim dower in the same, under her former husband. *Usher v. Richardson*, xxix. 415.

10. Soon after the giving of a mortgage of land, one B. claimed some interest in the land, and conveyed to certain purchasers a few small pieces of it. Some of his execution creditors, (whose rights the plaintiffs have,) levied his supposed life estate in the premises, and then recovered a judgment for possession and mesne profits:—

While that suit was pending, the mortgager conveyed to said purchasers, the small pieces above named; and conveyed to B. the whole premises, taking back from B. a mortgage. In a bill against the original mortgagees, and against B., and also the mortgager and the persons who claimed the small lots under B.:—*Held*, that the defendants were not estopped to deny that C. had any interest in the land, when the first suit was commenced. *Jackson v. Myrick*, xxix. 490.

12. Pending the action for possession and mesne profits, N. conveyed the land to B., and took back a mortgage. In a suit by the same plaintiffs, neither B. nor N., nor persons claiming under them, are estopped to deny that B. had any interest in the land at the commencement of the first suit. *Jackson v. Myrick*, xxix. 490.

13. Though one claiming land under a conveyance from the husband of a demandant in dower, be estopped to deny the seizin of the husband, he may

show, that the seizin was not such as to confer a right of dower. *Gammon v. Freeman*, xxxi. 243.

14. In an assignment by a debtor, under Act of April 1, 1836, a creditor made a release of his demands beyond what was provided for in the assignment: — *Held*, that such creditor is not estopped to repudiate it, though he may have received several partial payments under the assignment. *Vose v. Holcomb*, xxxi. 407.

15. The record of a suit, in which a plaintiff had recovered judgment, cannot be used against him as an *estoppel* in a subsequent suit between him and one not a party or privy to the first suit. *Parsons v. Copeland*, xxxiii. 370.

16. Although it may appear of record that an occupant of land obtained his title through a succession of owners, the earliest of which conveyances recited that the title was derived under the lottery Act, such occupant is not estopped by such recital in his title deed, unless it appear, by *legal testimony*, that title was acquired under the lottery Act, and that the occupant claims absolutely under that title. *Hovey v. Woodward*, xxxiii. 470.

17. Where land is conveyed with a covenant of non-claim, and "that he will warrant and defend the same free from all incumbrances by him made," he is not estopped to claim the land under a title subsequently acquired by him. *Wells, J.*, dissenting. *Partridge v. Patten*, xxxiii. 483.

18. An estoppel is commensurate only with the covenant out of which it springs. *Kinnear v. Lowell*, xxxiv. 299.

19. The acceptance, within twenty years, of a deed granting a mill site, and reciting the existence of another mill site above it, does not estop the grantee from asserting the abandonment, by non-user, of the upper site, unless the deed shows that the upper site had a right of priority in the use of the water. *Farrar v. Cooper*, xxxiv. 394.

20. If one accepts a beneficial interest under a will, he is precluded from setting up any title, or claim in himself whereby to defeat the will in any of its provisions. *Smith v. Guild*, xxxiv. 443.

21. A judgment upon default, in trespass *quare clausum*, is no estoppel to the defendant, in a subsequent suit, to assert title in himself or in another. *Dunlap v. Glidden*, xxxiv. 517.

22. A former judgment estops a party to deny in a second suit what was directly decided in the former. *Rogers v. Libby*, xxxv. 200. *Hobbs v. Parker*, xxxi. 143.

23. In a sealed obligation to pay the purchase money of land, a recital that the obligee had, by a "bond, bound himself" to convey, estops the purchaser to deny the authority of the agent by whom the seller's bond purports to have been executed, if the seller have not repudiated it. *Augusta Bank v. Hamblet*, xxxv. 491.

24. A grantor is not permitted to prove that his solemn declarations, in covenants of warranty in the deed given by him, are false; no person having asserted any claim to the premises, which, if valid, would constitute an incumbrance. *Temple v. Partridge*, xlii. 56.

25. A., for a valuable consideration, agreed to convey to B., certain premises within two years, provided B. paid a stipulated sum within that time to A., and also all taxes that might be levied on the premises, and an agreed sum annually for rent. B. failed to perform the conditions, allowed the property to be sold for taxes, purchased the tax title and defended against A. by force of that title: — *Held*, that it was the duty of B. to pay the taxes; and



that he cannot set up, as against A., a title which he obtained in violation of that duty. *Haskell v. Putnam*, XLII. 244.

26. Where a tract of land is granted in clear and unmistakable terms, the grantor and those claiming under him, are estopped to say that the land thus described in the deed was inserted by mistake, and that another piece of land was intended. *Brown v. Allen*, XLIII. 590.

See ACTION, 41.

BANK, 5.

PAUPER, 71.

PROPRIETORS OF LAND.

## II. BY PAROL, OR IN PAIS.

27. At law, as well as in equity, where one by words and acts willfully causes another to believe certain things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things, as existing at the same time. *Copeland v. Copeland*, XXVIII. 525. *Stevens v. McNamara*, XXXVI. 176. *Cummings v. Webster*, XLIII. 192.

28. Where the plaintiff town notified the defendant town, that J. C., his wife and their seven children, naming them all, had fallen into distress, &c., and the defendants acknowledged the receipt of the notice "touching the C. family," and denied that "J. C." had a settlement in the defendant town:—*Held*, that the defendants were not estopped to deny the settlement of the family in their town. *Palmyra v. Prospect*, XXX. 211.

29. In a suit brought in the name by which certain persons were incorporated into a company, the defendant may be estopped, by his own acts, to deny the legal existence of the company. *So. Bay M. D. Co. v. Gray*, XXX. 547.

30. An owner's disavowal of any title to personal property, will not preclude him from setting up his ownership, even as against the party to whom the disavowal was made, unless the conduct of such party was influenced by it, and unless it was made for the purpose of having such influence. *Morton v. Hodgdon*, XXXII. 127.

31. If one, having title to land by an unrecorded deed, make himself instrumental in causing another to purchase the same from a third person, such owner will not be permitted to set up his title as against such purchaser. *Matthews v. Light*, XXXII. 305. *Diafield v. Newton*, XLI. 221.

32. The declarations of a party which should estop him, as to a third person, must be made to one who has a right to know the relations of the party to the property in question; if made to one having no such right, they would not necessarily create an estoppel. *Sullivan v. Park*, XXXIII. 438.

33. One of the claimants to disputed land, permitted a third person to occupy, upon a stipulation that if his title should prove to be good, he would sell it to such occupant, but no price was agreed upon:—*Held*, that the occupant was not estopped to deny the title of such claimant. *Frye v. Gragg*, XXXV. 29.

34. By a dedication of land for a highway, the owner is estopped to reclaim the land, to the injury of those who have in good faith acquired rights de-

pendent upon its enjoyment. *Cole v. Sprowl*, xxxv. 161. *State v. Wilson*, xlii. 9.

35. An allegation in a writ cannot operate as an estoppel, when the judgment recovered is no muniment of title, and the party insisting is no party to the judgment. *Sheldon v. White*, xxxv. 233.

36. A purchase of land, for value, made by the advice and assistance of a third person, will not estop such third person from setting up a title subsequently acquired by him. *Stevens v. McNamara*, xxxvi. 176.

37. Where one enters on land to which he has no title, nor justifies such entry under one claiming title, he cannot controvert the right of the party in possession. *Bigelow v. Hillman*, xxxvii. 52.

38. Where an administrator sells at auction his intestate's right to two contiguous lots of land, and a third person, at his request, points out the line between them, to which boundary no objection is made by the purchasers; one of them is not estopped thereby from claiming to the true line of his lot, beyond the one thus pointed out, unless, at the time of the sale, he knew where the true line was, and the other purchaser was induced to, and did purchase in consequence of his silence or some acts by him done. *Titus v. Morse*, xl. 348.

39. Notwithstanding the actual residence of the indorser of a note when he indorsed it and when it became due, was in a place other than that to which notice of dishonor was sent; yet, if he held himself out to the public as a resident of the latter place, and thereby deceived the holder, and led him to change his course and send the notice to that place, he is estopped to deny the fact. *Lewiston F. Bank v. Leonard*, xliii. 144.

40. A party will not be estopped by formal statements and admissions, unimportant, and by which no one is deceived, and when the facts are within his own knowledge. *Cummings v. Webster*, xliii. 192.

See ATTACHMENT, 72.

BILLS, &c. 155.

## EVIDENCE.

- I. PRODUCTION OF THE BEST EVIDENCE.
- II. ADMISSIBILITY OF EVIDENCE, AS IT RESPECTS ITS QUALITY.
- III. ADMISSIBILITY OF PAROL EVIDENCE, TO AFFECT THE CONSTRUCTION OF WRITINGS.
- IV. PRESUMPTIVE EVIDENCE.
- V. BURTHEN OF PROOF.
- VI. EVIDENCE, AS APPLICABLE TO PARTICULAR SUBJECTS AND ISSUES.
- VII. DECLARATIONS AND ADMISSIONS.
- VIII. OTHER PRINCIPLES.

*For Evidence appropriate to particular subjects, See APPROPRIATE TITLES.*

## I. PRODUCTION OF THE BEST EVIDENCE:

- (a) IN CASE OF INSTRUMENTS OR RECORDS LOST, OR NOT PRODUCED.
- (b) ATTESTING WITNESSES.
- (c) COPIES.
- (d) GENERALLY.

(a) *In case of instruments or records lost, or not produced.*

1. If the record of a judgment of a justice of the peace has been lost, a party must show that he has exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him, before other evidence can be admissible. *Wing v. Abbott*, xxviii. 367. *Hanson v. Kelley*, xxxviii. 456.

2. Where lumber had been cut on reserved lots, set out by the County Commissioners, and had been seized and sold by persons claiming to act for the public, parol evidence is admissible to prove that the persons acting as County Commissioners were such *de facto*. *Dillingham v. Smith*, xxx. 370.

3. Parol testimony, offered, not to prove a lost record of County Commissioners, but as a substitute for such a record, is inadmissible. *Small v. Pennell*, xxxi. 267.

4. The 34th Rule of the Court does not justify the introduction of any papers touching the realty, except deeds. *Dunlap v. Glidden*, xxxi. 510. *Hutchinson v. Chadbourne*, xxxv. 189.

5. Neither can a conveyance of land be proved by parol evidence of the contents of a lost paper, unless it be proved that the paper was a deed legally executed. *Dunlap v. Glidden*, xxxi. 510.

6. Parol evidence is inadmissible to prove the contents of the declaration in a writ, sued out by another party, unconnected with the action on trial, and which had been settled before Court, and yet remains in the hands of the attorney by whom drawn. *Baker v. Pike*, xxxiii. 213.

7. And notice, to the opposing counsel, to produce a written paper, is ineffectual, if the paper be held by him as the counsel of some person unconnected with the action on trial. *Baker v. Pike*, xxxiii. 213.

8. In order to the introduction of secondary evidence, to prove the contents of a document, alleged to have been lost, generally, it is necessary to show that search has been made among the papers of the person to whom its custody belonged. *Sellers v. Carpenter*, xxxiii. 485.

9. A party may sometimes show the loss of a paper, to the Court, by his own affidavit, in order to the introduction of secondary evidence. *Mason v. Tallman*, xxxiv. 472.

11. As a general principle, a party offering to prove a fact, by a deed, must produce, and prove the execution of the deed. *Hutchinson v. Chadbourne*, xxxv. 189.

12. To this principle, in certain classes of cases "touching the realty," the 34th Rule of the Court has created an exception; but that Rule does not authorize the introduction of copies as evidence, when the "realty" is not the subject matter of the suit. *Hutchinson v. Chadbourne*, xxxv. 189.

13. Without proof of its loss, or a foundation laid for secondary evidence, the contents of a receipt cannot be proved by parol. *Staples v. Wheeler*, xxxviii. 372.

14. Secondary evidence of the contents of a paper, alleged to be lost, is not admissible, upon the testimony of a witness that he was the clerk of the party and had the oversight and filing of his papers, and had made thorough search with the party among them, but could not find it, and believed it to be lost. *Hanson v. Kelley*, xxxviii. 456.

15. When a disclosure of a poor debtor is made in writing, parol evidence of its contents is inadmissible, unless it be shown that the original or a duly certified copy is unattainable. *Winsor v. Clark*, xxxix. 428.

16. An office copy of the plaintiff's title deed is not admissible, on proof that the original was in the hands of the defendant's attorney. It must be proved to have been lost. *Bird v. Bird*, xl. 392.

17. The acceptance of a charter, creating a company, must be proved by the best evidence in the power of the party relying upon it. The books of a corporation are the regular evidence of its doings. *Hudson v. Carman*, xli. 84.

18. If its records cannot be produced, the acceptance may be proved by implication from the acts of the company. *Hudson v. Carman*, xli. 84.

(b) *Attesting witnesses.*

19. A party, having called the subscribing witness to prove the execution of an instrument, may prove, by other persons, that such witness had elsewhere made statements at variance with his testimony. *Shorey v. Hussey*, xxxii. 579.

(c) *Copies.*

20. A deed of the grantee of the State cannot be considered as belonging to the archives of the State, and it cannot be proved by a copy made by the Land Agent. *Hammatt v. Emerson*, xxvii. 308.

21. A paper, belonging to the archives of the State, may be proved by a duly authenticated copy. *Hammatt v. Emerson*, xxvii. 308.

22. Letters addressed to a public officer, in his official capacity, when received, become public documents, and may be proved in like manner. But extracts and portions cannot. *Hammatt v. Emerson*, xxvii. 308.

23. Letters written by the agents of the seller, whose contents have been made known to the purchaser as an inducement to the purchase, are the only evidence of their contents, unless their loss is proved. *Hammatt v. Emerson*, xxvii. 308.

24. A copy of the decree of the Circuit Court of the United States, although not made in a case between the parties, is the only legal evidence of the facts stated therein. *Hammatt v. Emerson*, xxvii. 308.

25. The 34th Rule of the Court does not authorize the admission, in evidence, against a demandant in dower, without the proper proof of loss of the original, of an office copy of a deed, acknowledged by her husband, though not by her, and recorded, purporting to be a conveyance of the premises by the husband, and a relinquishment by her of her claim to dower therein. *Sellars v. Carpenter*, xxvii. 497.

26. In an action to recover a tax, where the defence is, that the defendant had removed from the town prior to May first, of that year, a copy of the

record of an assignment of a mortgage to him, from the registry of deeds, wherein he was described as of the town assessing the tax, with no other evidence connecting the defendant with such assignment, is inadmissible. *Bennett v. Treat*, xxviii. 212.

27. A copy of the debtor's application for a citation to the creditor, certified by one of the said justices in his capacity of justice of the peace, is inadmissible to invalidate the certificate of the two justices. *Ayer v. Fowler*, xxx. 347.

28. Neither, for that purpose, can the plaintiff introduce a copy, certified as above, of the citation, officer's return upon it, or of the officer's statement of his mode of appointing one of the justices. *Ayer v. Fowler*, xxx. 347.

29. Nor, for that purpose, is a copy of the disclosure admissible, unless certified by both. *Ayer v. Fowler*, xxx. 347.

30. When the book of original assessments is lost, a proved copy, as secondary evidence, may be used. *Freeman v. Thayer*, xxxiii. 76.

31. An heir, claiming real estate under a deed to his ancestor, cannot prove the genuineness of such deed by an office copy, although the persons, purporting to have been the parties, and the subscribing witnesses and the register, are all dead. *White v. Dwinel*, xxxiii. 320.

32. Under the 34th Rule of the Court, office copies of deeds are admissible in cases "touching the realty," and in no other. *Hutchinson v. Chadbourne*, xxxv. 189. *Doe v. Scribner*, xxxvi. 168.

33. To show that a debtor obtained a discharge of the debt fraudulently, copies of original deeds of conveyance, made by him about the same time, are inadmissible, unless the originals are lost. *Doe v. Scribner*, xxxvi. 168.

34. Office copies of deeds, purporting to show that the title of the land was not in the judgment debtor, at the time of the levy, are inadmissible, for the purpose of showing a levy invalid, in order to revive the judgment once satisfied by such levy. *Jackson v. Nason*, xxxviii. 85.

35. On the trial of an appeal from a justice of the peace, copies of the record and of all other papers filed in the case, excepting such as were used in evidence, are the legal and best evidence of the record, and cannot be explained or contradicted by parol evidence or original documents. *Holden v. Barrows*, xxxix. 135.

36. A certified copy by the town clerk of the appointment of an agent to sell liquors under c. 211, of Act of 1851, is not sufficient evidence of agency. *State v. Gray*, xxxix. 353.

37. To authorize the use of the copy of the plaintiff's title deed, the original must be proved to be lost. *Bird v. Bird*, xl. 392.

38. Copies of all the papers made by the applicant in bankruptcy, to the District Court of Massachusetts, were offered; the orders and decrees of the Court, appointment, bond and account of the assignee, and the marshal's certificate, tacked together by a ribbon, to which was prefixed the certificate of the clerk of that Court, that it contained the copies of the whole record in that case, with the seal of the Court affixed; but on several of the papers, thus tacked together, was his certificate that they were true copies:—*Held*, that the documents thus offered were not duly authenticated, and, hence, were inadmissible. *Pike v. Crehore*, xl. 503.

39. An agreement to allow secondary evidence, in regard to the contents of a paper alleged to be lost, cannot be construed as an agreement to dispense

with proof of its execution. There being no proof of the genuineness of the signature, a copy of it, proved to be a correct one, is not legally admissible. *Moor v. Carey*, XLII. 29.

(d) *Generally.*

40. The receipt of the indorsee to the indorser is admissible in evidence, to show payment. *Garnsey v. Allen*, XXVII. 366.

41. The minutes of the proceedings of two justices of the peace and of the quorum, informal as a record, but containing sufficient memoranda from which the record *in extenso* may be made, are admissible in evidence, until the record is completed. *Chamberlain v. Sands*, XXVII. 458.

42. Where the settlement of paupers is in controversy, it is not necessary to prove, by the record, that the persons acting as overseers of the poor were legally chosen and qualified. It is sufficient to show that they acted as such. *Brewer v. Machias*, XXVII. 489.

43. In an action against the defendant, for commencing a suit against the plaintiff, in the name, and without the consent, of a third person, parol evidence of the arrest and commitment is admissible, where the writ is lost. *Foster v. Dow*, XXIX. 442.

44. Where the quantity of lumber is in question, though the witness, at first, testify from his recollection of the scale bill, yet, if he have knowledge of the quantity, irrespective of the scale bill, he may testify to the quantity, without the production of the scale bill. *Mudge v. Pierce*, XXXII. 165.

45. Deeds, having been rejected for not having been recorded, were offered again on the same day, having been recorded in the intervening time:—*Held*, they were admissible. *McDonald v. Philbrook*, XXXIII. 366.

46. In an action upon a collector's bond, parol evidence is admissible to show, that bills of assessments with legal warrant were committed to the collector. *Brighton v. Walker*, XXXV. 132.

47. The original commission, authorizing clergymen to solemnize marriages, or an authenticated copy of the record of it, and not a certificate, under the hand of the Governor and the seal of State, attested by the Secretary, that the person had been appointed and qualified to solemnize marriages, and that he continues to hold the office, is legal evidence of the person's authority. *State v. Hasty*, XLII. 287.

## II. ADMISSIBILITY OF EVIDENCE, AS RESPECTS ITS QUALITY.

- (a) CERTAINTY.
- (b) RELEVANCY, AND HEREIN OF USAGE.
- (c) MATERIALITY.
- (d) HEARSAY, AND RES INTER ALIOS.
- (e) ENTRIES.
- (f) OPINION AND REPUTATION.

(a) *Certainty.*

48. In debt, on a judgment recovered in another court, if there be introduced two copies of the record duly authenticated, variant from each other, *it seems*, that the plaintiff must fail for uncertainty. *Tibbetts v. Baker*, XXXII. 25.

49. But, in such case, any person who has compared the copies with the original may testify which is the true copy. *Tibbetts v. Baker*, xxxii. 25.

50. To invalidate the evidence of a witness, regarding a note he had testified about, defendant showed that he "manifested surprise at finding such a note in his papers, but could not recollect what he said:"—*Held*, that such testimony was too indefinite and uncertain to be admissible. *Smith v. Morgan*, xxxviii. 468.

51. Between principal and agent, receipts, taken by the latter for the payment of money to third persons on account of his principal, are admissible in evidence to support an account in set-off for such disbursements, without proof of their actual payment. *Given v. Gould*, xxxix. 410.

52. In a suit upon a note, given for the conveyance of a patent right, proof that such patent was void, for being an infringement of a prior one, is not admissible, without that fact has been determined by the Circuit Court of the United States. *Elmer v. Pennell*, xl. 430.

(b) *Relevancy, and herein of usage.*

53. In case against the defendant, for a conspiracy between him and a deputy sheriff to defraud the plaintiff, by means of making a false return upon a writ in the defendant's favor, evidence that the defendant had applied to another deputy, to do a similar act in another suit, is inadmissible. *Handley v. Call*, xxvii. 35.

54. If the debtor was not legally entitled to take the poor debtor's oath, within the time limited in his bond, and a suit is brought upon it, it is not competent to show that evidence might have been introduced which would have authorized the taking of the oath. *Robinson v. Barker*, xxviii. 310.

55. The parties to a note, deposited in a bank in Boston, for collection, cannot be affected by a usage in the other banks, which does not exist in the bank where it is lodged. *Pierce v. Whitney*, xxix. 188.

56. In trespass *quare clausum*, evidence of acts of trespass upon other lands of plaintiff, than those described in his writ, is inadmissible. *Longfellow v. Quimby*, xxix. 196.

57. In an action by one town against another, for the expense of a pauper, whose settlement is contested, evidence of a former suit, for previous expenses of the same pauper, and of payment of the same by the overseers of the defendant town, is admissible. *Harpswell v. Phippsburg*, xxix. 313.

58. In an action against the defendant, for commencing a suit against the plaintiff, in the name, and without the consent, of a third person, the defendant, in order to show authority, will not be allowed to prove, that the person, in whose name it was brought, suffered himself to be defaulted in an action, brought for services, in commencing and prosecuting it. *Foster v. Dow*, xxix. 442.

59. One holding under a warranty deed from a mortgager has a right, in a suit against him by the mortgagee, to prove the payment made by the mortgager, by which the land was relieved from the mortgage. *Williams v. Thurlow*, xxxi. 392.

60. In an indictment, charging a conspiracy to prosecute one who was not guilty, it is not admissible for the government to prove that the defendants prosecuted other persons who were guilty. *State v. Walker*, xxxii. 195.

61. In an action against the editor of a newspaper, for a libellous publica-

tion, it is admissible for the plaintiff to show articles, in subsequent numbers of the same paper, for the purpose of proving that the plaintiff was the person intended to be defamed. *White v. Sayward*, xxxiii. 322.

62. Testimony that the witness, upon reading the libellous article, considered the plaintiff as the person intended to be defamed, is inadmissible. *White v. Sayward*, xxxiii. 322.

63. Testimony is relevant, which has a tendency, however remote, to establish the probability, or improbability of the fact in controversy. *Trull v. True*, xxxiii. 367.

64. A testator devised land. The heir resisted the probate of the will, alleging the insanity of the testator. Upon a promise by the devisee, that the evidence before the Judge of Probate in favor of the will should be withdrawn, and the will disallowed, the heir conveyed a part of the land to the devisee: — *Held*, that, to avoid the deed as fraudulent, proof of the insanity is not admissible, unless connected with evidence tending to prove, or with an offer to prove, that the insanity was known to the devisee or his agent, prior to the taking of the deed. *Larrabee v. Larrabee*, xxxiv. 477.

65. Upon such an investigation, evidence is admissible to show what testimony, prior to the execution of the deed, was given of the insanity, in the presence of the grantee, in the Probate Court. *Larrabee v. Larrabee*, xxxiv. 477.

66. In a suit for an injury, occasioned through a defect in a highway, evidence, that on former occasions, the driver had "appeared to be a competent driver," seems to be inadmissible. *Lawrence v. Mt. Vernon*, xxxv. 100.

67. A question in cross-examination may be precluded, if its relevancy to the issue be not made known to the Court. *Rumsey v. Bragg*, xxxv. 116.

68. A written memorandum by one of the parties to a contract, in which they had been jointly interested, that he would equalize the expenses, does not tend to prove that there had been any modification of it. But such memorandum might show that such modification was not considered to be unreasonable. *Palmer v. Fogg*, xxxv. 368.

69. Where, in an action for services, a common law award is put in in defence, the plaintiff will not be allowed to introduce evidence, that the services were rendered at an agreed price and upon contract, and that an account in favor of the plaintiff and his co-partner, for similar services, were not laid before the arbitrators. *Johnson v. Knowlton*, xxxv. 467.

70. Plaintiff submitted his claims, and he and his co-partner submitted their joint claims, against the defendants to arbitrators, who heard and acted upon both cases at the same time. The defendants introduced a receipt and an order against the plaintiff: — *Held*, that testimony, offered by the plaintiff to show, that to himself and partner there was due a large sum from the defendants, was inadmissible. *Johnson v. Knowlton*, xxxv. 467.

71. In an action against an officer for not attaching *certain goods*, not in the possession of the debtor, evidence that subsequently he did attach those goods, upon another writ, by special request, and that they were afterwards appropriated to the payment of the latter claim, is irrelevant. *Weld v. Chadbourne*, xxxvii. 221.

72. Where another bond and note were made in lieu of former ones, in an action on the latter note, it is proper for the jury to examine both bonds, to ascertain whether the interest had been paid otherwise than by the note. *Smith v. Taylor*, xxxix. 242.



73. In an action for damages against the defendants, for the bad condition in which they left the passage-way from the highway to his tavern stand, the plaintiff cannot show that the carriages of travelers were upset by reason of defendants' omission. *Hubbard v. A. & K. R. R. Co.*, xxxix. 506.

74. The indemnity made by the counsel may be read to the jury, when the issue before them is whether the instructions of a client authorized his counsel to indemnify an officer in the client's name. *Nutt v. Merrill*, xli. 237.

75. In ejectment for a lot of land, called the "Gore," bounded by a lot belonging to the tenant, the only question being as to the true original location of the north line of the "Gore," the tenant introduced a deed of his lot from his original grantors, who were also the original grantors of the demandant, dated subsequently to that under which the demandant claimed, and introduced testimony tending to prove, that the original location of the north line of the "Gore" was in accordance with his claim: — *Held*, that the testimony was admissible in connection with the other testimony of the case. *Chase v. White*, xlii. 228.

76. In an action upon a note, to which defendant's name had been signed by a third person, other notes, signed in the same manner, either dated subsequent to the inception of the one in suit, or the existence of them not known to the defendant until after that time, and which the defendant had paid or promised to pay, are not admissible to show original implied authority of such third person to sign the note in suit. *Forsyth v. Day*, xlii. 382.

77. Neither are they competent to establish the ratification or adoption by the defendant of the act of such third person in signing his name to the note. *Forsyth v. Day*, xlii. 382.

78. Proof that the plaintiff had entered into a contract with A., similar to that made by the former with the latter; that he had received of A., a note similar to the one in suit, for a similar part performance, and then had neglected to fulfil its other stipulations, is not competent evidence to show, that the consideration of the note in suit grew out of the contract between the plaintiff and defendant. *Hall v. Tribou*, xlii. 192.

79. A defendant cannot introduce evidence in support of an issue which he has not presented by his pleadings. *Lincoln v. Fitch*, xlii. 456.

80. Usage may be general and still confined to a particular city, town or village. When men are hired with no special agreement as to the time they are to work, evidence of what the usage in that particular employment is, as to time, is admissible. *Gleason v. Walsh*, xliii. 397.

#### (c) *Materiality.*

81. In an action by the indorser against the maker, for a payment made to the indorsee, evidence offered by the maker, that the property received by the indorsee was in fact of less value than the amount for which it was received, is immaterial and inadmissible. *Garnsey v. Allen*, xxvii. 366.

82. Whether any of the facts connected with arrangements made preparatory to the commission of a crime, can be deemed collateral or immaterial, *quere*. *State v. Sargent*, xxxii. 429.

83. In an action by an innocent indorsee, against the maker of a note, to whom it came before pay-day, for a valuable consideration, and without notice of objection, the defendant will not be allowed to prove, that it was an ac-

commodation note, without value, and obtained by fraud. *Fletcher v. Gushee*, xxxii. 587.

84. Nor, that by mistake the note bore date earlier than the day upon which it was actually made, for the purpose of showing that the suit was prematurely brought. *Huston v. Young*, xxxiii. 85.

85. In such action, evidence to prove any *fact* which might have defeated the suit, between the original parties, is immaterial. *Walker v. Davis*, xxxiii. 516.

86. Where the tenant claims by adverse possession, evidence as to the manner in which the land was run out and monuments established, when he entered upon it under contract with the owners, is immaterial. *Gray v. Hutchins*, xxxvi. 142.

87. In an action on a poor debtor's bond, good at common law, but not a statute bond, evidence that the debtor disclosed notes of hand, which were not appraised, is not admissible. *Clark v. Metcalf*, xxxviii. 122.

88. In dower, the declarations of demandant's husband, as to his equitable title, are immaterial. *Mann v. Edson*, xxxix. 25.

89. In an action against the acceptor by the drawee of a bill of exchange, who procured its acceptance, evidence that the conditions upon which it was agreed to be accepted were not fulfilled, is admissible. *Wise v. Neal*, xxxix. 422.

90. In an action against an officer for attaching goods claimed by plaintiff by sale from the debtor, the officer alleging the sale to be fraudulent as to creditors, the declarations and acts of the plaintiff's vendor are admissible; and it is immaterial whether the vendee is present or absent when such declarations were made. *White v. Chadbourne*, xli. 149.

91. Prior to the organization of a railroad corporation, the defendant, by his subscription, agreed to become the holder of twenty-five shares in the capital stock, upon the condition, that not less than the least sum required by the charter should be subscribed:—*Held*, that it was not competent for a subscriber to show that the shares, subscribed and recorded, were by persons of no pecuniary responsibility, with the qualification, that the defendant might introduce *any* testimony tending to show that the subscriptions were not made in good faith. *Pen. R. R. Co. v. White*, xli. 512.

92. It is immaterial with what motives and under what circumstances the defendant acted, in signing a paper calling, and in attending, a meeting of the directors at which certain assessments were made. *Pen. R. R. Co. v. White*, xli. 512.

93. In trespass *quare clausum*, deeds, not shown to afford either material or competent evidence, are inadmissible. *Melcher v. Merryman*, xli. 601.

94. A. brought his action against B. for causing back water at the wheels of his mill, by obstructing the race-way. B. offered to prove that the back water was caused by a wing dam:—*Held*, that this testimony was admissible. *Monroe v. Gates*, xlii. 178.

95. In trespass, to recover the value of certain liquors, which had been seized upon a warrant, and for which a writ of restitution had issued, proof, that at the time of seizure, and for a considerable time previous, intoxicating liquors had been kept for sale by the plaintiff, and that he had been in the habit of selling them in violation of law, is material to prove their *status* at the time of the seizure. *Lord v. Chadbourne*, xlii. 429.

95. A party plaintiff, purchaser of goods, alleged to have been made in fraud of creditors, being a witness, may well testify concerning his motives and purposes in reference to the purchase of the goods. *Edwards v. Currier*, XLIII. 474.

(d) *Hearsay, and res inter alios.*

96. An inference, founded upon hearsay, is no more admissible in evidence, than a fact obtained in like manner. *Mason v. Tallman*, XXXIV. 472.

97. Hearsay is never admissible, if, from the nature of the case, it is apparent that better evidence is attainable. *Gould v. Smith*, XXXV. 513.

98. Facts, within the personal knowledge of a deponent, tending to show an intention of the pauper to change his residence, may be given in evidence; but when, from the whole answer, it is manifest that the facts stated were merely communicated by the pauper to the deponent, they must be excluded. *Richmond v. Thomaston*, XXXVIII. 232.

99. The declarations of a person, competent to be a witness, assigning the reasons for not doing a certain act, are *res inter alios*, and inadmissible. *Sargent v. Hampden*, XXXVIII. 581.

100. An agent's recital of a past transaction of the business of his principal is regarded as hearsay testimony and inadmissible. *Burnham v. Ellis*, XXXIX. 319.

101. The covenants in a collector's deed, of land sold for taxes, are not evidence that the necessary preliminary steps were taken to pass the title to the grantee, against one in possession under a recorded deed. *Phillips v. Phillips*, XL. 160.

102. The declarations of the plaintiff's vendor, made long after a sale, the validity of which is in issue, are not admissible. *White v. Chadbourne*, XLI. 149.

(e) *Entries.*

103. Contemporaneous entries, made by third persons, in their own books, in the ordinary course of business, the matter being within the knowledge of the party making the entry, and there being no apparent motive to pervert the fact, *it seems*, are admissible. *Dow v. Sawyer*, XXIX. 117.

104. Books of a deceased agent, in his own handwriting, are admissible for his principals, if, on inspection, they appear to have been fairly kept, and the entries made in due course of his agency business. *Dow v. Sawyer*, XXIX. 117.

105. The partnership book, containing charges against one of the partners, for moneys paid by him upon his private debts, is receivable in evidence for the defendant, to prove that the other partner must have known of such payments, although some other payments may have been made, and not entered upon the book. *Foster v. Fifield*, XXIX. 136.

106. A manuscript book cannot be received to decide, between witnesses, respecting the date of an occurrence, if none of the entries of the book were made by either of the witnesses. *Cornville v. Brighton*, XXXV. 141.

107. Entries made by different persons, and some of them unknown, in books of a private character, are not admissible. *Lord v. Moore*, XXXVII. 208.

108. Entries in the books of a bank, made by the cashier, deceased, in the ordinary course of his business, tending to prove any material fact in an issue, are admissible. *Pike v. Crehore*, XL. 503.

See EVIDENCE, 294-310.

(f) *Opinion and reputation.*

109. In the trial on indictment for murder by procuring abortion, an experienced physician, after having made a *post mortem* examination, may offer his opinion as an expert, whether the female had been pregnant, and as to what caused her death. *State v. Smith*, XXXII. 369.

110. Testimony of witnesses, that, upon reading the libellous article, they considered the plaintiff as the person intended to be defamed, is not admissible. *White v. Sayward*, XXXIII. 322.

111. That the employments of a witness have not been such as to require him to distinguish between true and simulated handwritings, is not, of itself, sufficient reason to preclude him from giving an opinion as to the genuineness of a disputed signature, though the opinion be founded merely upon a comparison of writings. *Sweetser v. Lowell*, XXXIII. 446.

112. The subscribing witnesses to a will, though not experts, may give opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded. *Cilley v. Cilley*, XXXIV. 162.

113. A deposition, impeaching the general reputation of an opposing witness, for truth, cannot be excluded, although it also shows that the reputation was founded upon the witness' neglect to perform his agreement. *Hapgood v. Fisher*, XXXIV. 407.

114. In an action on a warranty for the soundness of a horse, a witness who testifies for plaintiff as to the appearance and action of the horse, but who is not an expert, cannot be asked, on cross-examination, whether he had observed the same appearances in horses who had been hard driven and then exposed. *Moulton v. Scruton*, XXXIX. 287.

115. Persons, who have been many years engaged in building and carrying on mills, are experts in their business, and their testimony as such is admissible. *Hammond v. Woodman*, XLI. 177.

116. In general, the opinion of a witness is not evidence. He must speak of facts; for his opinion may be arrived at by some unwarrantable deduction, or premises not well established. *Lewis v. Brown*, XLI. 448.

117. It is proper for a surgical expert, who examined a wound, to give his opinion of the character of the instrument that produced it. *State v. Knight*, XLIII. 11.

118. A witness, possessing scientific skill, may properly be inquired of whether there be a distinction, chemical, physical, or microscopic, between the qualities of human blood and that of any animal. *State v. Knight*, XLIII. 11.

### III. ADMISSIBILITY OF PAROL EVIDENCE, TO AFFECT THE CONSTRUCTION OF WRITINGS.

(a) GENERALLY.

(b) EVIDENCE OF THE SITUATION OR ACTS OF THE PARTIES.

(c) IN CASE OF RECEIPTS.

(d) TO CONTROL OR EXPLAIN RECORDS AND JUDGMENTS.

(a) *Generally.*

119. Parol evidence is not admissible to vary the meaning of a promissory note. If the promise is jointly and severally to pay, it cannot be shown to be otherwise. *Mariner's Bank v. Abbott*, xxviii. 280.

120. It is competent, however, for one or more signers to prove by parol, that he or they are sureties merely. *Mariner's Bank v. Abbott*, xxviii. 280.

121. So, that, at the time of making a mortgage of personal property, the parties agreed that the possession should remain with the mortgager; such evidence not contradicting the mortgage. *Pierce v. Stevens*, xxx. 184.

122. Parol evidence is inadmissible to control the legal effect of bills of exchange. *Hancock v. Fairfield*, xxx. 299.

123. And, to prove that a deed, absolute and unrestricted on its face, was intended merely to convey an estate in trust; and, to reduce such a deed to a conditional one. *Ellis v. Higgins*, xxxii. 34. *Augusta Bank v. Augusta*, xxxvi. 255.

124. To authorize the Court to reform a deed for mistake, the mistake may be established by parol. *Farley v. Bryant*, xxxii. 474.

125. Parol evidence is inadmissible to show that the grantor, in describing the boundaries, supposed that the words used would have an effect different from that which the law affixes. *Farley v. Bryant*, xxxii. 474.

126. And, to show that a written mortgage of a chattel was intended to constitute a mere pledge. *Whitney v. Lowell*, xxxiii. 318.

127. The recitals in the treasurer's deed, are not conclusive, as evidence of the facts therein stated. *Longfellow v. Quimby*, xxxiii. 457.

128. Evidence is admissible, that the third referee agreed to sign the award, which was signed by two only. *Anderson v. Farnham*, xxxiv. 161.

129. In an action against a subscriber to capital stock, to recover assessments on the shares, parol evidence is not admissible to show that the subscription was upon a condition, not expressed in the writing. *K. & P. R. R. Co. v. Waters*, xxxiv. 369.

130. Parol evidence is admissible to show whether a deed conveying a farm included a fenced lot, belonging to the grantor, upon which he had erected a tenement to let. *Morrell v. Cook*, xxxv. 207.

131. The reduction to writing, of a business contract, precludes each party from proving its particular provisions, by showing what the negotiation was, which terminated in the writing. *Palmer v. Fogg*, xxxv. 368.

132. Neither a written submission, nor an award, can be explained or varied by parol. *Buck v. Spofford*, xxxv. 526.

133. But a party may show, by parol, what controverted matters were laid before the referees and acted upon by them. *Buck v. Spofford*, xxxv. 526.

134. A grantor cannot limit the effect of his deed, by his testimony. *Gray v. Hutchins*, xxxvi. 142.

135. The consideration of a written release, not under seal, may be proved, though none be mentioned. *Burrill v. Saunders*, xxxvi. 409.

136. Parol testimony cannot be received to give the effect of a mortgage to a bill of sale, absolute in its form, though not under seal. *Bryant v. Crosby*, xxxvi. 562.

137. But where a bill of sale purports to be for a cash consideration

already paid, it may be shown by parol that the payment was not made in cash, and also in what manner it was made. *Bryant v. Crosby*, xxxvi. 562.

138. Where a poor debtor disclosed attachable property, which was duly demanded, but the officer's return of the demand was dated, by mistake, one year too early, the creditor may prove the facts by parol. *Torrey v. Berry*, xxxvi. 589.

139. A tract of land, conveyed by courses and distances, without referring to monuments or other locations, cannot be enlarged by proof, that the owners of the adjoining lands had concurred, at a former period, with the grantor, in establishing one of its side lines upon a course variant from that in the deed. *Robinson v. Miller*, xxxvii. 312.

140. In an action upon written orders for the delivery of goods, which do not refer to any prior negotiation, parol evidence is inadmissible to prove a previous agreement for a longer time of credit than that expressed by the orders. *Chase v. Jewett*, xxxvii. 351.

141. Considerations, additional to those mentioned in a deed, when not inconsistent therewith, are provable by parol. *Brown v. Lunt*, xxxvii. 423. *Nickerson v. Saunders*, xxxvi. 413. *Hersey v. Verrill*, xxxix. 271.

142. Parol evidence, that the delivery of a deed was to be void, upon the fulfillment of a verbal condition, is inadmissible. *Warren v. Miller*, xxxviii. 108.

143. A deed, free from ambiguity, cannot be limited in its legal effect by parol; neither can the intention of the parties be proved by parol. *Jordan v. Otis*, xxxviii. 429. *Rogers v. McPheters*, xl. 114. *Emery v. Webster*, xlii. 204.

144. In a suit on a poor debtor's bond, the disclosure by him made, signed and sworn to, is admissible; but his statements, made at the same time, are inadmissible. *Jewett v. Rines*, xxxix. 9.

145. Where the plaintiff conveyed to defendant, a house, by deed with a covenant against incumbrances, and occupied it afterwards for a certain time, parol evidence, that the plaintiff was to possess it rent free, and that the defendant agreed to pay the taxes assessed before the conveyance, is admissible. *Hersey v. Verrill*, xxxix. 271.

146. Parol evidence is admissible to correct an error in the name of the payee of a written order, when it is so connected with the testimony, that the real owner may be clearly ascertained; and that such order was accepted for the benefit of the plaintiff. *Jacobs v. Benson*, xxxix. 132.

147. But parol evidence is not admissible to change or vary the meaning of a contract set forth in the condition of a bond. *Whitney v. Slayton*, xl. 224.

148. A., in an action against B., cannot be permitted to prove that his own deed to B. was without consideration, when it purports to be for consideration. *Hammond v. Woodman*, xli. 177.

149. Evidence, with reference to the plan by which a purchase is made, in conflict with the language of the deed itself, is inadmissible. *Wellington v. Murdough*, xli. 281.

150. Where a deputy sheriff sold property on an execution, indorsed his doings thereon in his handwriting, and died before having signed the same, and an action is brought against the sheriff, for a wrongful disposition of the property attached, as well as for loss or injury consequent upon a partial non-

compliance with the law: — *Held*, that evidence may be received touching the premises, no return having been completed by signature. *Loveitt v. Pike*, *XXI.* 340.

151. The description in a deed contained the following: — “All that part of lot 87, &c., lying westerly of the centre of the *old channel*,” &c.: — *Held*, that parol evidence was admissible to explain the phrase “old channel.” An instruction, limiting the application of the evidence, by the jury, simply to the question of the antiquity of the channel, was erroneous. *APPLETON, J.*, dissenting. *Emery v. Webster*, *XLII.* 204.

152. The identical monument referred to in a deed may always be shown by parol. *Emery v. Webster*, *XLII.* 204.

153. Parol evidence is admissible to prove the payment of a debt secured by a mortgage, and also the sum to redeem an equity of redemption sold on execution. *Thornton v. Wood*, *XLII.* 282.

(b) *Evidence of the situation or acts of the parties.*

- 154. In determining the place where a monument, described in a deed, stood, the acts of the proprietors of the adjoining lots, in ascertaining and establishing the old boundary, many years before a question concerning its location arose, are admissible. *Gilbert v. Curtis*, *XXXVII.* 45.

155. Where no practical construction of a conveyance is given by the parties, by establishing monuments or boundaries, their acts upon the land and declarations concerning it are not admissible to affect its legal construction. *Pierce v. Faunce*, *XXXVII.* 63. *Chandler v. McCord*, *XXXVIII.* 564. *Wellington v. Murdough*, *XLI.* 281.

156. Any obscurity in the meaning of contracts may be removed by reference to the situation of the parties. *Folsom v. Mer. Mut. M. Insurance Co.*, *XXXVIII.* 414. *Emery v. Webster*, *XLII.* 204.

(c) *In case of receipts.*

157. A receipt, signed by the plaintiff, acknowledging the payment of the judgment in issue, is *prima facie* evidence, though not under seal. *Clark v. Mann*, *XXXIII.* 268.

158. So far as a bill of lading is a receipt, it may be controlled by parol proof, in a suit between the parties to it. *O'Brien v. Gilchrist*, *XXXIV.* 554.

159. Parol evidence is admissible to vary or contradict a written receipt. *Richardson v. Beede*, *XLIII.* 161.

(d) *To control or explain records and judgments.*

160. Where a creditor has a note against joint promisors, secured by mortgage upon real estate, and he acknowledges payment upon the margin of the record, from the promisors, and discharges the mortgage, the acts and declarations of one of the promisors may control and overcome the evidence of payment from the margin of the record. *Patch v. King*, *XXIX.* 448.

161. Where the officer's return, upon a warrant for a town meeting, did not show that the copies were attested, or that they were posted in conspicuous places, evidence that the copies were attested, and posted in public and conspicuous places in the town, will not cure the defect. And it is only admissi-

ble for the purpose of showing that the officer ought to be permitted to amend his return, and when it appears he is willing to amend it. *Fossett v. Bearce*, xxix. 523.

162. Whether an appeal has been taken from a judgment of a justice of the peace must be determined from the record. Parol evidence is inadmissible upon that point. *Gammon v. Chandler*, xxx. 152.

163. In a suit upon a poor debtor's bond, parol testimony is inadmissible for the plaintiff, to show that one of the justices was appointed by the officer, before the hour appointed for the disclosure; or, that the debtor disclosed a note which was not appraised; or, that the debtor had conveyed his property in fraud of his creditors. *Ayer v. Fowler*, xxx. 347.

164. An officer, by his testimony as a witness, cannot contradict his return, that, upon a levy of land, he had delivered seizin to the judgment creditor. *Cowan v. Wheeler*, xxxi. 439.

165. An officer's return cannot be explained or varied by parol. *Grover v. Howard*, xxxi. 546. *Huntress v. Tiney*, xxxix. 237.

166. Parol testimony is inadmissible to prove the allegation of a plea in abatement, that, after an appeal had been taken, the writ had been altered without leave of Court. *Levant v. Rogers*, xxxii. 159.

167. In a suit against an officer, (who had attached property, and taken a receipt for the same,) for not delivering either the property or the receipt, it is not competent for the defendant to show, in mitigation, that the property was of a value less than was stated in the return. *Allen v. Doyle*, xxxiii. 420.

168. In an action upon a judgment, it is inadmissible to prove, that prior to its rendition, a part of the claim, upon which it was founded, had been paid. *Bird v. Smith*, xxxiv. 63.

169. So, in an action upon a security, given in satisfaction of a judgment, whether the payment had been made to the nominal plaintiff or to a party having an equitable interest therein. *Bird v. Smith*, xxxiv. 63.

170. If the ground of a judgment be not shown by the record, it may be shown by parol. *Dunlap v. Glidden*, xxxiv. 517. *Rogers v. Libbey*, xxxv. 200. *Emery v. Fowler*, xxxix. 326.

171. Copies of the record of a justice of the peace cannot be explained or controlled by parol or extraneous evidence. Even the original writ cannot be admitted to contradict the copy. *Holden v. Barrows*, xxxix. 135.

172. Where an execution appears to be satisfied in part, by a levy, evidence is inadmissible to show that such property did not, in fact, belong to the debtor, and that the value of it had been refunded by the plaintiff to the real owner. *Sawyer v. Lawrence*, xl. 256.

See *BILLS*, &c., 97.

*EVIDENCE*, 386.

#### IV. PRESUMPTIVE EVIDENCE.

173. R. S. of 1841, c. 146, § 25, does not create a bar, but only a presumption of payment of a judgment, which presumption may be rebutted. *Brewer v. Thomes*, xxviii. 81. *Jackson v. Nason*, xxxviii. 85.

174. The poverty of the debtor, a demand by the creditor, and a reply by



the debtor, "that he would come up soon, and do something about it," are sufficient to repel the presumption. *Brewer v. Thomes*, xxviii. 81.

175. Parties to contracts are presumed to know and use language legitimately, and parol evidence, that language is used in a different sense, is inadmissible. *Littlefield v. Littlefield*, xxviii. 180.

176. Cattle are not presumed to be lawfully going at large. There must be proof that the town gave permission. *Perkins v. R. R. Co.*, xxix. 307.

177. An absolute deed, for a good and valuable consideration, carries with it the presumption, that the grantee holds the land conveyed to his own use; and this presumption cannot be rebutted by parol. *Philbrook v. Delano*, xxix. 410.

178. Any one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent for some third person. *Baxter v. Duren*, xxix. 434.

179. A conveyance of land, belonging to a co-partnership firm, in which all the co-partners join, carries with it a presumption, in the absence of proof, that the consideration money went to the benefit of the firm. *Lincoln v. White*, xxx. 291.

180. Where evidence was admitted for defendant, upon condition, that he would prove another material and connected fact, which he was unable to do, the proceedings having transpired in the presence of the jury, the Court will presume they disregarded the evidence, though not expressly instructed so to do. *Bangor v. Brunswick*, xxx. 398.

181. If a paper, without being submitted to the Court, be handed to the witness, as a release, and he is allowed to testify without objection to its sufficiency, it is to be presumed the opposing party waived all objections to it. *Bullen v. Arnold*, xxxi. 583.

182. In a trial involving the validity of a collector's sale, for taxes, though a part only of the requisite proofs be positive and direct, yet, if the suit be brought more than thirty years after the sale, the jury may presume that the tax was duly authorized and assessed, and that all other proceedings requisite to the validity of the sale, were properly had. *Freeman v. Thayer*, xxxiii. 76.

183. If a party does not present his objection to a witness' testifying, at the earliest opportunity, it is to be presumed that the objection is waived. *Stuart v. Lake*, xxxiii. 87.

184. The lapse of twenty years furnishes a legal presumption, that a debt, though secured by a mortgage of land, has been paid; but such presumption may be rebutted by parol. *Sweetser v. Lowell*, xxxiii. 446.

185. If there be no evidence of the time or circumstances of the indorsement of a negotiable note, or of any knowledge by the indorsee of any infirmity in the note, the presumption of law is, that the indorsement was made prior to the pay-day, and in the regular course of business, and without knowledge on the part of the indorsee, that the note was subject to any pre-existing equities. *Walker v. Davis*, xxxiii. 516.

186. There is no presumption in law, that an unnegotiable note, of the same amount of a pre-existing book debt, was taken as payment of the debt. *Bartlett v. Mayo*, xxxiii. 518.

187. Where the grantor of land remains in possession after the conveyance, a legal presumption arises that he is tenant of the grantee; but it may be repelled by parol. *Larrabee v. Lumbert*, xxxiv. 79.

188. In the absence of controlling proof, the legal presumption is, that by a deed of conveyance duly executed and recorded, the title passes; that the grantor had sufficient seizin to enable him to convey; and that the seizin and title correspond with each other. *Blethen v. Dwinel*, xxxiv. 133. *Bolster v. Cushman*, xxxiv. 428.

189. On the question, whether a will shall be established, there is no legal presumption of the testator's sanity. *Cilley v. Cilley*, xxxiv. 162.

190. A non-user of a right for twenty years, acquired by use to maintain a dam, unimpeded by any dam below it on the same stream, furnishes presumptive evidence of an extinction of the right by abandonment; but it may be rebutted. *Farrar v. Cooper*, xxxiv. 394.

191. A servitude is presumed to be extinguished, when the proprietor of an estate, charged with it, is permitted, for a sufficient length of time, to manage it in such manner as to preclude the exercise of the rights arising out of that servitude. *Farrar v. Cooper*, xxxiv. 394.

192. Where there appeared to have been a material alteration in an officer's return upon a legal precept, and no suggestion was offered, that the alteration was not made by the officer conformably to the facts:—*Held*, that the presumption was, not that a fraud had been committed, but that the alteration was rightfully made before the signing of the return. *Boothby v. Stanley*, xxxiv. 515.

193. The giving of a negotiable note for a simple contract, raises a presumption of payment; but such presumption may be overcome by testimony. *Shumway v. Reed*, xxxiv. 560.

194. Proof that prohibited sales were made at the store of a trader, of articles belonging to him, by a clerk in his employ, does not alone create a legal presumption of guilt in such trader, though he have knowledge of such sales and receive the pay for the articles sold. *State v. Tibbetts*, xxxv. 81.

195. Possession of personal property is sufficient evidence of ownership, until controlled by evidence of a superior title. *Millay v. Butts*, xxxv. 139. *Linscott v. Trask*, xxxv. 150.

196. Possession of land, for twenty years, by a mortgagee, without any payment of principal or interest by the mortgager or any other negotiations, in regard to the land, is presumptive evidence of foreclosure. *Blethen v. Dwinel*, xxxv. 556.

197. Possession of the land by the mortgager, for twenty years, is presumptive evidence that the mortgage debt has been paid. *Blethen v. Dwinel*, xxxv. 556.

197. Until the expiration of twenty years from the recovery of a judgment, there arises, from lapse of time, no degree of presumption, that the judgment has been paid. *Thayer v. Mowry*, xxxvi. 287.

198. A conveyance is not presumed to have been made to one in possession of land for many years, against his express admissions, that no such conveyance has been made. *Roxbury v. Huston*, xxxvii. 42.

199. Where no objections are made to the legality of the records of a proprietary, it is a presumption of law, that they have been made conformably to the requirements of the statutes in force at the time of the transactions therein recorded. *Proprietors of Long Wharf v. Palmer*, xxxvii. 379.

200. If the presumption of payment of a judgment be attempted to be overcome by evidence of the continued insolvency of the judgment debtor, from the fact, that soon after its recovery, he failed in business, no legal in-

ference will arise, that his insolvency continued afterwards. *Jackson v. Nason*, xxxviii. 85.

201. If a person on trial for an alleged offence, offer no evidence of his good character, no legal inference can arise, from such omission, that he is guilty of the offence charged, or that his character is bad. *State v. Upham*, xxxviii. 261.

202. Where, by the records, the school district officers appear to have been qualified by a magistrate, the presumption is, in the absence of all testimony, that they were made by the proper recording officer. *Tozier v. S. D. No. 2, Vienna*, xxxix. 556.

203. The effect of deeds and contracts, made in a foreign country, without any evidence before the Court of what it may be, is presumed to be the same as if made within our own jurisdiction. *Whidden v. Seelye*, xl. 247.

204. In an action upon a mortgage, (which was given to secure three notes, the two having the longest pay-day having been paid shortly after maturity,) the note first due was not produced, nor any evidence given of its loss, or that it remained unpaid:—*Held*, that, after a lapse of thirty years, payment may be presumed. *Mathews v. Light*, xl. 394.

205. The character in which the parties to a note sign the same is presumed to be correctly exhibited by the writing itself, until the contrary be proved. *Lord v. Moody*, xli. 127.

206. An indorsement of a note by the payee, is presumed to have been made at the date of the note, in the absence of proof to the contrary. *Parker v. Tuttle*, xli. 349.

207. Ownership is not established by a deed to the defendants from a party not shown by the evidence to have had title in him, while it does appear from the evidence, that a third party has in himself an older and apparently, a perfect outstanding title; and the presumption, in the absence of proof in such case, is, that the possession follows the superior title. *Sidelinger v. Hagar*, xli. 415.

208. The Court cannot presume that he, who assumes to convey as owner, is such in fact, or undertake to supply a link in the chain of title, whose existence is rendered probable, but which is not in the case. *Sidelinger v. Hagar*, xli. 415.

See EVIDENCE, 223.

PRESUMPTION.

## V. BURTHEN OF PROOF.

209. It is incumbent on the demandant, claiming title under a deed from a corporation, executed by one in the character of its agent, to prove that the corporation, by a legal vote, had authorized such person to make the conveyance. *Miller v. Ever*, xxvii. 509.

210. To discharge a note for merchantable boards and clapboards, the burthen is upon the maker, to show that the articles set out and tendered, were of such quality and condition, as, under the statute, might be “offered” or “exposed for sale,” or “delivered on sale.” *Jones v. Knowles*, xxx. 402.

211. If the defence to a promissory note be the illegality of consideration, the *onus* is on the defendant. *Emery v. Estes*, xxxi. 155.

212. When the plaintiff's book and oath have proved the charges sued, if the defendant rely upon payment made, the *onus* is on him to prove it, either by cross-examination of the plaintiff, or from other sources. *Witherell v. Swan*, xxxii. 247.

213. In an action of covenant broken, for not delivering articles according to the obligation, a traverse of the plea, "that the defendant had not broken his covenant," places the *onus* upon the plaintiff to prove negatively, that the articles had not been delivered. *Sawtelle v. Sawtelle*, xxxiv. 228.

214. In some cases, a trustee may be discharged, if his disclosure show his liability to be doubtful. In cases of *prima facie* liability, dependent upon the facts put in issue, the burthen of full proof is upon the trustee. *Butman v. Hobbs*, xxxv. 227.

215. Although one, contracting to pay money upon receiving a payment to himself from a third person, does not defeat or diminish his liability by a surrender of his authority to receive such payment; still, his liability ceases, if, by means of the insolvency of such third person, or for any other cause, the contractee could not be damnified by the surrender. In which case, the *onus probandi*, that the contractee could receive no damage, is on the contractor. *Read v. Davis*, xxxv. 379.

216. When regulations, known to an operative, provided for a forfeiture of wages, provided he left the service without having given previous notice, if he would rely on the employer's consent, or upon having fulfilled the term of labor contracted, the *onus probandi* is on him. *Harmon v. S. F. Man. Co.*, xxxv. 447.

217. Proof of the consideration, required to sustain a written contract against an executor, must be furnished by the party enforcing it. *Walker v. Patterson*, xxxvi. 273.

218. In an action, by an indorsee of a witnessed note, made before Act of 1838, c. 343, took effect, which action was commenced after six years from the inception of the note, the burden is on the plaintiff to prove that the note was witnessed, and, if the witness be absent from the State, the genuineness of his signature. *Reed v. Wilson*, xxxix. 585.

219. When the defendant justifies his acts, as having been done in the performance of his duty, in removing obstructions in the highway, which acts would otherwise have been a trespass on the rights of the plaintiff, the burden is on him, to show that the highway, where the acts were done, was built upon its location. *Weed v. Sibley*, xl. 356.

220. In trespass *quare clausum*, the *onus* is upon the plaintiff to show affirmatively, the location of the monuments named in his deed, and that they include the *locus in quo*. *Robinson v. White*, xlii. 209.

See ARBITRATION, 54.

BILLS, &c. 151, 172, 173.

PRESUMPTION.

# VI. EVIDENCE, AS APPLICABLE TO PARTICULAR SUBJECTS AND ISSUES.

- (a) INSANITY.
- (b) USAGE.
- (c) FRAUD.
- (d) HANDWRITING.
- (e) JUDGMENTS AND RECORDS.
- (f) OFFICERS' RETURNS.
- (g) RECORDS OF CORPORATIONS.
- (h) PUBLIC RECORDS, DOCUMENTS, OFFICIAL ACTS, AND CERTIFICATES.
- (i) ANCIENT BOOKS AND DEEDS.
- (j) BOOK ACCOUNTS.

## (a) *Insanity.*

221. Insanity, occurring after a residence has been established, will not prevent the acquisition of a settlement, if the residence be continued five years without the receiving of pauper supplies. *Machias v. East Machias*, XXXIII. 427.

222. The selectmen are empowered to adjudicate upon the question of insanity, when applied to for warrant to send a person to the insane hospital for that cause. *Eastport v. East Machias*, XXXV. 402.

223. A person, proved to be insane, would be presumed to continue so, until the contrary appeared, unless the want of mental soundness arises from causes which are temporary only, in their influence. *Weston v. Higgins*, XL. 102.

224. To invalidate a deed at common law, for the insanity of one of the parties to it, an entire loss of the understanding must be shown. *Hill v. Nash*, XLI. 585.

225. But weakness of intellect is a fact to be weighed by the jury, in determining whether the conveyance was fraudulent. *Hill v. Nash*, XLI. 585.

226. Where there is conflicting evidence on the question of insanity, the jury must settle the question as one of fact. *Hill v. Nash*, XLI. 585.

See INSANE PERSONS.

## (b) *Usage.*

227. When a usage, which may affect the rights of the parties, is presented by the testimony, it becomes the duty of the Court to determine whether, if proved to the satisfaction of the jury, it be reasonable and operative. *Codman v. Armstrong*, XXVIII. 91.

228. Parties to a note, deposited in a bank in Boston, for collection, cannot be affected by a usage in the other banks, which has no existence in the bank where it is lodged. *Pierce v. Whitney*, XXIX. 188.

229. Upon a dispute, as to the contract upon which a shipmaster sailed a vessel, evidence is admissible to prove the custom in such business. *Perkins v. Jordan*, XXXV. 23.

230. If, after the commencement of a voyage, the vessel stops at a neighboring port for additional men, under the plea of usage, such a usage must be proved, as would show that the parties had reference to it when the insurance was obtained. *Folsom v. Mer. Mut. M. I. Co.*, XXXVIII. 414.

231. Usage, to be binding, must be uniform and universal. *Folsom v. Mer. Mut. M. I. Co.*, xxxviii. 414.

(c) *Fraud.*

232. A partial failure of consideration of a note, arising out of fraudulent misrepresentations respecting the quantity of timber trees then upon it, is admissible while in the hands of the seller, or of one having no superior rights. *Hammatt v. Emerson*, xxvii. 308. *Coburn v. Ware*, xxx. 202.

233. And, if the purchaser sells a portion of the land to another, and gives to the seller, in part payment, a note signed by such other as principal, and the purchaser as surety, the latter may set up fraud. *Hammatt v. Emerson*, xxvii. 308.

234. To make a party liable, the representation must have been false, fraudulently made, and have occasioned damage. *Hammatt v. Emerson*, xxvii. 308.

235. Where one has made a positive representation, or professed to speak from his own knowledge, without having had any knowledge on the subject, the falsehood is disclosed, and the intention to deceive inferred. *Hammatt v. Emerson*, xxvii. 308.

236. The representations made by plaintiff's agent to defendant, are admissible on the question of fraud. But the inducements which operated on the mind of the agent are inadmissible. *Hammatt v. Emerson*, xxvii. 308.

237. The fact, that the assured, in his affidavit, estimated the value of his goods at \$2800, and the jury returned a verdict of \$1853 only, is not such evidence of fraud and false swearing as would justify the Court in granting a new trial. *Moore v. Pro. Ins. Co.*, xxix. 97.

238. On motion to reject an award, the affidavit of the party is not evidence that he was fraudulently induced to enter into the submission. *Smith v. Smith*, xxxii. 23.

239. When goods have been obtained by false representations, it is allowable, in order to establish the fraudulent intent, to prove that false representations, with the fraudulent intent, were made by the defendant, about the same time to other persons. *Cragin v. Tarr*, xxxii. 55.

240. Declarations of a party, made more than two years prior to a conveyance of land to him, and not connected with it, are inadmissible as evidence to prove fraud in the conveyance. *Littlefield v. Getchell*, xxxii. 390.

241. Fraud, in the procurement of a deed of land, can be established only upon proof that the grantee, or his agent, did some act or made some representation, which was deceptive or false, knowing it to be so. *Larrabee v. Larrabee*, xxxiv. 477.

242. It is fraud in a person to acquiesce in the use of his name, by another, without authority, to the injury of innocent parties; and the law will not permit him to deny the authority of the assumed agent. *Forsyth v. Day*, xli. 382.

See FRAUD.

(d) *Handwriting.*

243. Upon the question of the genuineness of a signature, evidence as to

its resembling the writing of the party may be given by a witness who has seen him write; and such witness may state his belief as to its genuineness. *Hopkins v. Megquire*, xxxv. 78.

244. Upon such evidence, it is competent for the jury to find a verdict that the signature is genuine. *Hopkins v. Megquire*, xxxv. 78.

(e) *Judgments and records.*

245. When a grantee has been evicted by virtue of a judgment recovered against him, that judgment is legally admissible, in an action on the covenants of the deed, to prove eviction. And, if the grantor had notice of, and an opportunity to appear and defend that suit, it is evidence against him, to prove the title of the party recovering, but not otherwise. *Hardy v. Nelson*, xxvii. 525.

246. A judgment is evidence of the amount of indebtedness between the parties to it; but not as to third persons, not privies thereto. *Sargent v. Salmon*, xxvii. 539. *Parsons v. Copeland*, xxxiii. 370. *Trustees of P. F. School v. Fisher*, xxxiv. 172. *Glass v. Nichols*, xxxv. 328.

247. If it appear by the record of a judgment, rendered in another State, that the Court had no jurisdiction of the parties, such judgment will not be received here as having any force or validity whatever. *Middlesex Bank v. Butman*, xxix. 19.

248. A written statement, made and signed by the justices before whom a poor debtor disclosed, not purporting to be a record of their proceedings, is not admissible as evidence. *Randall v. Bradbury*, xxx. 256.

249. A certified copy, by a justice of the peace, of a record of a judgment rendered by him, is the proper evidence, on a plea of *nul tiel record*, to support an action of debt on the judgment. *Wentworth v. Keazer*, xxx. 336.

250. But it is competent for the defendants to prove, by parol, that what purports to be such a certified copy was not authentic. *Wentworth v. Keazer*, xxx. 336.

251. One, who has been a justice of the peace, has no authority to certify copies after two years from the expiration of his commission. Authentications by him, after that time, are merely void. *Wentworth v. Keazer*, xxx. 336.

252. In a suit against one as indorser of a writ, the docket entry, together with the extended record of the original action, both stating that the defendant indorsed the writ, is not sufficient evidence of that fact. *Wilson v. Hobbs*, xxxii. 85.

253. The writ itself, if to be found, is the only evidence in such case. *Wilson v. Hobbs*, xxxii. 85.

254. In a suit upon a judgment, recovered before a justice of the peace, the plaintiff is bound to establish the existence of the record. It is not sufficient to introduce a book, alleged to contain the record, without some proof of its authenticity. *Wentworth v. Keazer*, xxxiii. 367.

255. The allegations of a former writ, in which the present defendant had recovered judgment, as plaintiff, may be used as evidence of his admissions, although the present plaintiff was neither party nor privy to such suit. And the record of the former suit is evidence of such allegations. *Parsons v. Copeland*, xxxiii. 370.

256. A writ of entry had been brought against two persons jointly. They united in the defence, which prevailed in this Court, upon a report of certain facts agreed, and of certain testimony introduced. In a suit by one of the defendants against the other, for the same land: — *Held*, that the demandant could not use that report in evidence. *Frye v. Gragg*, xxxv. 29.

257. An officer, who has attached goods by order of the plaintiff, when sued by one who has been adjudged trustee, because he held those goods under a fraudulent sale, may use in evidence, as privy to the attaching plaintiff, the record of the judgment against the trustee. *Glass v. Nichols*, xxxv. 328.

258. Where the owners of adjoining lots agreed, in writing, to submit a disputed line to referees, and subsequently, but before the decision of the referees, one of the parties conveyed his lot to a third person, having no notice of the agreement; an award, afterwards made, is not admissible in a suit involving the same line, between one of the parties to the agreement and the grantee of the other. *Emery v. Fowler*, xxxviii. 99.

259. Where the amount of damages in a suit pending, with other matters, between the parties, is submitted to arbitrators, their award of the amount for which the defendant shall be defaulted is admissible and conclusive. *Cushing v. Babcock*, xxxviii. 452.

260. In debt upon the judgment of a justice of the peace, whose commission had expired more than two years before this trial, if the minutes upon the justice's docket are such as to enable the Court to perceive that they would authorize an extended record, they will be sufficient. *Grosvenor v. Tarbox*, xxxix. 129.

261. A copy of the record of an adjudication by selectmen upon the question of insanity, when acting within their jurisdiction, is the legal evidence of their judgment. *Eastport v. Belfast*, xl. 262.

262. Such judgment cannot be impeached by parol. If erroneous, it may be reversed. *Eastport v. Belfast*, xl. 262.

263. In a suit upon a note, given for a patent right, proof that such patent was void for being an infringement of a prior one is not admissible, unless that fact has been determined by the Circuit Court of the United States. *Elmer v. Pennell*, xl. 430.

264. Whether the defendant is as well known by the name in the indictment as by another, a former indictment against her by the same name, to which she pleaded not guilty, is competent evidence. *State v. Homer*, xl. 438.

265. In an action to recover, from a stockholder, the amount of a creditor's execution against a corporation, the organization and existence of the corporation must be proved, if denied. The former judgment obtained may not be conclusive of these facts. *Hudson v. Carman*, xli. 84.

#### (f) *Officers' returns.*

266. In case, against the present defendant, for the rescue of a debtor of the plaintiff from an officer, the return of the officer, on the writ, that he had arrested the body of the debtor, and that he was rescued by the present defendant, is not conclusive. *Francis v. Wood*, xxviii. 69.

267. Title, by levy, must appear by the officer's return. The creditor's declarations are not evidence. *Jackson v. Woodman*, xxix. 266.



268. The return of the officer, in a levy of real estate, that the appraisers were discreet and disinterested men, is conclusive of that fact. *Grover v. Howard*, XXXI. 546.

269. In a suit, by an officer, upon a receipt given for property attached, the officer's return, upon the execution, that he seasonably made a demand upon the receptor, is not an act required in his official duty, and therefore not evidence. *Bicknell v. Hill*, XXXIII. 297.

270. An officer's return, upon a writ of attachment, is conclusive that the property therein described has been attached. *Darling v. Dodge*, XXXVI. 370.

271. The return of an officer, upon an execution against a corporation, is sufficient evidence that he held the execution for the purpose of collecting it. *Came v. Bridgham*, XXXIX. 35.

272. Where the same person, who made an attachment as deputy, had ceased to be a deputy, but was a coroner when the execution was put into his hands, with orders to satisfy it from the property attached, and he did not so apply the property; in an action against the sheriff for such neglect, his return upon the execution is admissible so far as it relates to the demand. *Smith v. Bodfish*, XXXIX. 136.

273. A collector's return of his doings, upon his warrant to collect taxes, is *prima facie* evidence of the facts therein stated, in an action against him by a person assessed. *Caldwell v. Hawkins*, XL. 526.

274. The certificate of appraisers of property attached on mesne process, upon the back of a writ, and adopted by the officer as a part of his return, together with the latter, is competent evidence as to the disposition of the property sold. *Kennedy v. Pike*, XLIII. 423.

See OFFICER, 21-28.

EXECUTION, 62, 82, 90.

(g) *Records of corporations.*

275. When a subscription of capital stock is made, on condition that a certain number of shares shall be subscribed for before the corporation shall be organized, the records of its proceedings, showing that the required number had been taken, are competent evidence. *Pen. & Ken. R. R. Co. v. Dunn*, XXXIX. 587.

276. And where a subscription is based on a further condition, that the company is not to contract for the construction of its road until a given number of shares are taken, the books of the directors, in the absence of countervailing evidence, are competent to show a fulfillment of the condition, if the directors had authority to act. *Pen. & Ken. R. R. Co. v. Dunn*, XXXIX. 587.

277. And the doings of directors, *de facto*, whose acts have been ratified by the corporation, are not objectionable, although the records show another board to have been previously elected, but no evidence of their having accepted the trust. *Pen. & Ken. R. R. Co. v. Dunn*, XXXIX. 587.

278. The records of a corporation regularly kept, without any proof to destroy their effect, are competent to show its corporators, and whether the required number of shares were taken. *Pen. R. R. Co. v. Dummer*, XL. 172. *Pen. R. R. Co. v. White*, XLI. 512.

279. The acceptance of a charter, creating a corporation, must be proved

by the best evidence in the power of the party relying upon it. The books of a corporation are the regular evidence of its doings. *Hudson v. Carman*, XLI. 84.

See CORPORATIONS, 86—119.

(h) *Public records, documents, official acts, and certificates.*

280. Letters, addressed to a public officer in his official capacity, when received, become public documents, and may be proved in like manner. But extracts or portions of them are inadmissible. *Hammatt v. Emerson*, XXVII. 308.

281. Inquisitions, examinations, depositions, affidavits and other written papers, when they have become proofs of its proceedings, and are found remaining on the files of a judicial Court, are judicial documents. *Hammatt v. Emerson*, XXVII. 308.

282. Where an indictment alleges the person, deceased, to be late of B., in the County of P., the right of the administrator, to prosecute the indictment, may be proved by letters of administration, granted by the Probate Court of another County. *State v. Bangor*, XXX. 341.

283. In ascertaining whether a State tax of an earlier year was or was not paid, the books kept by the State Treasurer may be received in evidence. *Hodgdon v. Wight*, XXXVI. 326.

284. A statute, passed several years after a forfeiture of taxes had accrued, allowing the land to be redeemed within a limited time, may be taken into account, to show that the State never intended to preclude the proprietor from redeeming. *Hodgdon v. Wight*, XXXVI. 326.

285. No objections can be made against the admissibility of proprietary records, by one claiming title from grantors, who were members of such proprietary during the time the records were made. *Propr's of Long Wharf v. Palmer*, XXXVII. 379.

286. By the R. S. of 1841, c. 44, § 12, the protest of any foreign or inland bill of exchange, or promissory note or order, duly certified, by any notary public, under his hand and official seal, is made legal evidence of the facts stated in such protest, as to the same, and also as to the notice given to the drawer or indorser, in any court of law. *Ticonic Bank v. Stackpole*, XLI. 302.

287. The word "certificate" in the 6th section of said chapter, is equivalent to the word "protest" in the 12th section, when it is under the hand and seal of the notary. *Ticonic Bank v. Stackpole*, XLI. 302.

288. By common and commercial law, the certificate of a foreign notary, under his hand and notarial seal, of the presentment of a foreign bill for acceptance or payment, and of his protest, is received in all Courts. Such protests prove themselves. *Ticonic Bank v. Stackpole*, XLI. 302.

289. A note payable in another State may be treated as a foreign bill, so far as to admit the protest of a foreign notary as evidence in a suit against the indorser. *Ticonic Bank v. Stackpole*, XLI. 302.

290. The certificate of protest, by a notary public, of a dishonored note, contained these words:—"I duly notified J. S., indorser of said note, of said non-payment;"—*Held*, that it was a verbal notice. *Ticonic Bank v. Stackpole*, XLI. 321.

291. Where the acts of assessors are material, they may be established by the evidence of their books of assessments. *Milo v. Gardiner*, xli. 549.

See IDENTITY.

IMPOUNDING, 1.

(i) *Ancient dates and coeval facts.*

292. The Court permits a departure from the strict rules of evidence, in the use of papers, private memoranda, deeds, wills and other solemn instruments in writing, of an ancient date, to prove the existence of coeval facts. *Oldtown v. Shapleigh*, xxxiii. 278.

293. In order to prove in what town the residence of a pauper was on a particular day, twenty-two years before the trial, a writ drawn and dated on that day, in which he was plaintiff, and his residence was named, was allowed to be read in evidence, although it was never served, and although the attorney who drew it had no knowledge of the residence, except as stated to him by the pauper when it was drawn. *Oldtown v. Shapleigh*, xxxiii. 278.

(j) *Book accounts.*

294. Where a party relies upon his own book and suppletory oath, it is indispensable that he should testify that the services were performed or the articles delivered. *Dwinel v. Pottle*, xxxi. 167.

295. An attorney at law, by his book and suppletory oath, may prove his retainer and his services rendered in court. *Codman v. Caldwell*, xxxi. 560.

296. When the plaintiff, in aid of his book account, testifies that the article was delivered, not to the defendant, but to another person for the defendant's use, the book is to be excluded, unless there be other proof that such third person was defendant's agent. *Soper v. Veazie*, xxxii. 122.

297. A plaintiff's book is not competent evidence to prove a sale of goods, unless he can testify, or prove *aliunde*, a delivery. *Godfrey v. Codman*, xxxii. 162.

298. A book, kept by a surveyor of lumber, in which are entered the names of the buyer and seller, the quantity surveyed and time when, if it be the only book kept by him, from which he draws off the charges for his services, is admissible, with his suppletory oath, in a suit by himself for his fees. *Witherell v. Swan*, xxxii. 247.

299. A book must contain the original entry, made at the time, which is to be proved by the party. It must be in his handwriting, and show the amount of the claim. *Witherell v. Swan*, xxxii. 247. *Towle v. Blake*, xxxviii. 95. *Hooper v. Taylor*, xxxix. 224.

300. No particular form of a book is necessary; neither is its construction, or the material of which it is made, material; but it must appear to have been kept intelligibly, fairly and truthfully. *Witherell v. Swan*, xxxii. 247. *Hooper v. Taylor*, xxxix. 224.

301. The shop books of the plaintiff, with his suppletory oath, are admissible to show sale and delivery to defendant's wife. *Furlong v. Hysom*, xxxv. 332.

302. In an action for services rendered, if better evidence than a book charge may reasonably be supposed to exist from the nature of the services,

the book, with the suppletory oath, is inadmissible. *Towle v. Baker*, xxxviii. 95.

303. So it is inadmissible to prove price of services. *Towle v. Baker*, xxxviii. 95.

304. To support a charge against the defendant for procuring a writ in the name of a third person, the plaintiff's book, with his suppletory oath, is admissible. *Waterhouse v. Fogg*, xxxviii. 425.

305. A book, in which the entries were made by plaintiff's wife by his direction, and when the plaintiff could not write, is not admissible. *Luce v. Doane*, xxxviii. 478.

306. A wife, who thus keeps her husband's book, is incompetent to sustain the charges therein, by her suppletory oath. *Luce v. Doane*, xxxviii. 478.

307. Testimony, as to the habits of the party, in having his accounts thus kept by his wife, after his return from his work, is inadmissible. *Luce v. Doane*, xxxviii. 478.

308. It is not an insuperable objection to a book charge, that the quantity or weight of the articles charged, are omitted. *Hooper v. Taylor*, xxxix. 224.

309. No charges for cash, above forty shillings, can be proved by book and suppletory oath. *Hooper v. Taylor*, xxxix. 224.

310. Where charges are made from day to day, upon a slate, and then transcribed, as often as from two to four weeks, upon his book, such book, with suppletory oath, is admissible. *Hall v. Glidden*, xxxix. 445.

See EVIDENCE, 103—108.

## VII. ADMISSIONS, DECLARATIONS AND CONFESSIONS.

- (a) RES GESTAE.
- (b) ADMISSIONS AND DECLARATIONS OF PARTIES.
- (c) DECLARATIONS OF PRIVIES AND AGENTS.
- (d) DECLARATIONS OF THIRD PERSONS.

### (a) *Res gestae*.

311. The declarations of a party to a third person, and not appearing to be a part of any business transaction, cannot be introduced by him as testimony in his own favor. *Handly v. Call*, xxx. 9.

312. Declarations, made by a third person, when in the performance of an act, and illustrative of its purpose, are admissible as part of the act. *Corinth v. Lincoln*, xxxiv. 310. *Stewart v. Hanson*, xxxv. 506.

313. In order to the admission of declarations as *part of an act*, the act must have a tendency to establish the allegations which the party undertakes to sustain. *Corinth v. Lincoln*, xxxiv. 310.

314. Evidence, that a person, after having performed various jobs of labor in the line of his business, in the same and in neighboring towns, occasionally returned to the house of a particular family, where he stayed while out of employment, has no tendency to prove his residence in that family. His declarations, therefore, while going to, and returning from, that house, are inadmissible. *Corinth v. Lincoln*, xxxiv. 310.

315. Where a person, when delivering an article to the defendant, declared the reason to be, that, by a previous bargain, the article was to remain the defendant's property, unless paid for, which had not been done:—*Held*, the declaration was a part of the delivery, and therefore admissible in evidence. *Stewart v. Hanson*, xxxv. 506.

316. *Res gestae*, of which declarations may constitute a part, are such transactions only as the parties were connected with while the negotiation between them was incomplete. *Wilson v. Sherlock*, xxxvi. 295.

317. Where the defendant claims title to property, under a third person, by certain acts between that third person and the plaintiff, a letter written by such third person, and delivered to the plaintiff at the time of such acts, is admissible in evidence, as against the defendant, as part of the *res gestae*. *Roach v. Learned*, xxxvii. 110.

318. The declarations of a person, competent to be a witness, assigning the reasons for not doing a certain act, are no part of the *res gestae*. *Sargent v. Hampden*, xxxviii. 581.

319. After a transaction is closed, and the parties to it have separated, the declarations of others having no connection with it, though relating to it, are not admissible in evidence, as part of the *res gestae*. *Battles v. Batchelder*, xxxix. 19.

320. In a suit upon a note, the plaintiff having shown that the defendant's signature was made by his wife in his absence, and that the note was given by her in exchange for another note of the defendant, of like amount:—*Held*, that the cotemporaneous conversation in regard to the transaction, was part of the *res gestae*, although he could not show a ratification by the husband. *Shaw v. Emery*, xlii. 59.

#### (b) *Admissions and declarations of parties.*

321. Evidence of the declarations of the indorser, as to the contract, prior to the indorsement of the note and in reference to it, showing the terms upon which it was received, is admissible. *Fullerton v. Rundlett*, xxvii. 31.

322. Parol proof of admissions, made in conversations or declarations, is limited to what was said or done at the same time, relative to the same subject. *Hammatt v. Emerson*, xxvii. 308.

323. Where proof is introduced respecting admissions made in and proved by bills and answers in chancery, letters and other documents, the whole bill, answer, letter or other document, become testimony in the case. *Hammatt v. Emerson*, xxvii. 308.

324. The declarations of the defendant that he had kept and would keep spirituous liquors for sale, although they did not immediately accompany the act of selling, as proved, are admissible. *New Gloucester v. Bridgham*, xxviii. 60.

325. The affidavit of the assured, made in accordance with the policy, and his examination before the company's agent, after having been introduced without objection, are competent evidence as to the amount of the loss. *Moore v. Pro. Ins. Co.*, xxix. 97.

326. Where one partner has assigned his interest in the partnership effects to the other, to secure the latter for debts due him from the former, but remains liable for the debts, and entitled to his share of the surplus of the firm, his declarations are evidence against the firm, in an action in the name of the

firm, brought for the benefit of the assignee alone. *Foster v. Fifield*, xxix. 136.

327. In a prosecution for an illegal sale of intoxicating liquors, the declarations subsequently made by the defendant, as to his intentions, are inadmissible. *State v. Greenleaf*, xxxi. 517.

328. The declarations of a party, made more than two years prior to a conveyance of land to him, and having no connection with it, are not admissible to prove fraud. *Littlefield v. Getchell*, xxxii. 390.

329. The allegations of a former writ, in which the present defendant had recovered judgment as plaintiff, may be used as evidence of his admissions, although the present plaintiff was neither party nor privy to such suit. *Parsons v. Copeland*, xxxiii. 370.

330. Offers made by a party in a negotiation for a compromise, are not admissible against him. But his statement of facts concerning the subject of the negotiation may be proved, though made during the negotiation. *Cole v. Cole*, xxxiii. 542.

331. The previous declarations of a plaintiff, that he supposed he should have to commence a suit against the defendant for the benefit of a third person, and that if such third person should bring a suit, he should not object, will not preclude the plaintiff from using such third person as a witness, in a suit against such defendant, unless it be proved that the suit is, in fact, for the benefit of the witness, or that he will have some benefit from it, or be injuriously affected if the defendant recover. *Cole v. Cole*, xxxiii. 542.

332. In an action by the payee of a draft against the drawer, it is not admissible to prove, that when taking the draft, the plaintiff admitted the debt to have been contracted by the drawer as agent of the drawee, and thereupon promised that the drawer should never be held accountable. *Fairfield v. Hancock*, xxxiv. 93.

333. The declarations of one co-partner, made after the dissolution, concerning transactions prior to the dissolution, are admissible to charge the co-partnership. *Hinchley v. Gilligan*, xxxiv. 101.

334. Declarations by the vendor of property, made in disparagement of his title, and while he was in possession of the property, are admissible to disprove such title; and it is not necessary that at the time of making them, the property should be exhibited, or that any act should be done in relation to it. *Parker v. Marston*, xxxiv. 386.

335. Declarations, made by one part owner or tenant in common, admitting a joint liability of all the owners, are not admissible against the others. *McLellan v. Cox*, xxxvi. 95. *Page v. Swanton*, xxxix. 400.

336. It is a *joint interest*, and not a *community* of interest, that renders the declarations of one part owner evidence against the others. *McLellan v. Cox*, xxxvi. 95.

337. It is a general rule, that the admissions of one co-partner, with reference to the legitimate business of the co-partnership, are deemed the admissions of each and all its members. *Gilmore v. Patterson*, xxxvi. 544.

338. Declarations of the defendant in no wise relating to the issue, are not admissible in evidence; yet, if such declarations are so intermingled by him with matters pertinent to the issue, that they cannot be separated without modifying the pertinent matter, or rendering it obscure, then the whole of his declarations are admissible. *Lord v. Moore*, xxxvii. 208.

339. In an action against an officer, for not attaching certain goods of the debtor, not in his possession, declarations of the plaintiff, tending to show, that he had released all claim by attachment to any personal estate of the original debtor, are admissible. *Weld v. Chadbourne*, xxxvii. 221.

340. In a suit for money paid for defendant, as his surety on a note, signed at the request of a member of his family, which note plaintiff was compelled to pay:—*Held*, the declarations of the defendant of his dissent to what the plaintiff had done, uncommunicated to the plaintiff or to the payee of the note, are inadmissible. *Powers v. Nash*, xxxvii. 322.

341. In an action against an officer for levying an execution against a debtor, upon property claimed by the plaintiff, the debtor's declarations, not made in the presence of the plaintiff, are inadmissible. *Russell v. Clark*, xxxviii. 332.

342. Where a sale of property is alleged to have been fraudulent, the vendee cannot give in evidence the declarations of the vendor in previously offering to sell the same to other persons. *Fisher v. True*, xxxviii. 534.

343. But one having a right to impeach the sale may prove the declarations of the vendor, tending to show a fraudulent intent, made before the sale. *Fisher v. True*, xxxviii. 534.

344. Declarations of the vendor of personal property, while claiming title in the whole or in part, and while in possession, are admissible to affect the title of those claiming under him. *McLanathan v. Patten*, xxxix. 142.

345. Representations by the vendor as to the condition of personal property, made a month before the sale was consummated, are too remote to be admitted in evidence. *Bryant v. Crosby*, xl. 9.

346. The declarations of a party to the record, or of one identified in interest with him, are admissible, as against such party. *Fickett v. Swift*, xli. 65.

#### (c) *Declarations of privies and agents.*

347. Where plaintiff claimed a note under a gift, made by the donor two days before his death; and the defendant claimed it under a gift from the same person, made seven days prior to his decease:—*Held*, that the declarations of the donor, as well as the gifts under which the parties claimed, made during the sickness of which he died, and prior to the time of the gift under which the defendant claimed, and within two months next before the decease, tending to show that his intention was to give this note to the plaintiff, are inadmissible by the plaintiff. *Parker v. Marston*, xxvii. 196.

348. Representations, made to the defendant by the plaintiff's agent, are admissible on the question of fraud. But the inducements which operated on the mind of the agent are inadmissible. *Hammatt v. Emerson*, xxvii. 308.

349. In an action against the indorser, a letter of the maker addressed to the holder, informing him that he should not be able to pay it at maturity, and requesting an extension, is not admissible to excuse presentment. *Pierce v. Whitney*, xxix. 188.

350. Conversation by the moderator and others, in town meeting, relating to a subject legally under its consideration, cannot be proved, as evidence against the town. *Morrill v. Dixfield*, xxx. 157.

351. In a suit against a depository, to recover a fund lodged with him, to be paid to the plaintiff, when the depositor should have satisfied himself of a

fact connected with the deposit, evidence that the depositor had declared himself satisfied of the fact, is inadmissible, unless made known to the defendant before the suit. *Carle v. Bearce*, xxxiii. 337.

352. In a suit in the name of the assignor for the benefit of the assignee, the defendant cannot prove the assignor's declarations, made subsequently to the assignment. *Gillighan v. Tebbetts*, xxxiii. 360.

353. The declarations of a corporation director, respecting past transactions, are not admissible against the corporation. *Franklin Bank v. Cooper*, xxxvi. 179. *Franklin Bank v. Cooper*, xxxix. 542.

354. The declarations of a trustee, in whom is the legal interest, though acting wholly for the benefit of another, are admissible, though they affect the interest of the *cestui que trust* alone. *Franklin Bank v. Cooper*, xxxvi. 179.

355. The declarations, representations or admissions of an agent, authorized to make a contract, made as inducements to, or while making, the contract; or when made by the agent, accompanying the performance of any act done for the principal, are admissible against the principal. *Franklin Bank v. Steward*, xxxvii. 519.

356. When otherwise made, or when made at a subsequent time, they are inadmissible. *Franklin Bank v. Steward*, xxxvii. 519.

357. The declarations of the cashier, giving information as to a past transaction of the bank, though such transaction pertained to his own department of the business of the bank, are inadmissible against the bank. *Franklin Bank v. Steward*, xxxvii. 519. *Burnham v. Ellis*, xxxix. 319.

358. A surety on a note to the bank, having in his possession the property of his principal, with which he might have secured himself by attachment, sent his agent, after the pay-day, to inquire of the bank whether the note had been paid. To that inquiry, the cashier, in the banking room, declared that it had been paid; whereupon, the surety, relying upon that information, surrendered the property to the principal, who, soon afterwards, became and continued to be insolvent. In a suit by the bank against the surety: — *Held*, that the declaration of the cashier was inadmissible against the bank. *Per SHEPLEY, C. J., and TENNEY, and HOWARD, J. J., — RICE, and APPLETON, J. J., dissenting.* *Franklin Bank v. Steward*, xxxvii. 519.

359. Upon the issue whether the money claimed in the suit, belonged to the plaintiff or her late husband, after evidence by defendant, showing that the plaintiff had no money or property at the time of her husband's death, or for some year or two previous, the declarations of her husband within that period to the contrary, and in regard to the management of the property, are admissible. *Linscott v. Trask*, xxxviii. 188.

360. Upon a question of settlement, the declarations of a pauper while in the act of removing, or while acting with reference to removing from one town to another, are admissible. *Richmond v. Thomaston*, xxxviii. 232.

361. But his declarations, while about his ordinary business, as to his future intentions or expectations, are inadmissible. *Richmond v. Thomaston*, xxxviii. 232.

362. Where plaintiff claims title to personal property under a mortgage, and introduces the mortgager to sustain it, the defendant may prove his declarations, made subsequent to the mortgage, to contradict his testimony; and the jury may determine, from the whole testimony, whether the mortgage was fraudulent. *Stone v. Redman*, xxxviii. 578.



363. The acts and declarations of a deputy sheriff, after his official term had ceased, are not admissible in an action against the sheriff for his deputy's neglect, unless they refer solely to the official duty remaining upon him. His declarations or letters as coroner, respecting his past acts as deputy, are inadmissible. *Smith v. Bodfish*, xxxix. 136.

364. The declarations of an agent, while in the transaction of the business confided to him, or of officers of a bank, made to one transacting business with them in their official capacity, are binding upon his principal. *Burnham v. Ellis*, xxxix. 319. *Franklin Bank v. Cooper*, xxxix. 542.

365. But his recital of a past transaction of the business of his principal, although at the time of such recital, his agency continued, is inadmissible. *Burnham v. Ellis*, xxxix. 319.

366. Declarations and acts of a debtor, respecting property, alleged by an attaching creditor thereof, or one representing him, to have been fraudulently conveyed to the party claiming it, made or done before the supposed sale, are admissible if they tend to prove the fraudulent design. *White v. Chadbourne*, xli. 149.

367. The presence of the vendor in court, when such evidence is offered, is no objection to the testimony; nor is it to be excluded by the subsequent call of the vendor as witness by the defendant. *White v. Chadbourne*, xli. 149.

368. The acts or declarations of a vendor, made after other persons have acquired separate rights in the same subject matter, are inadmissible to disparage their title. *Dennison v. Benner*, xli. 332.

369. The declarations of a subscriber to capital stock in a railroad corporation, made long after the organization, in relation to his subscription, are not admissible to show that the incorporators did not act in good faith in receiving such subscription. *Pen. R. R. Co. v. White*, xli. 512.

#### (d) Declarations of third persons.

370. Where settlement is the subject of controversy, the declarations of the pauper respecting his intentions, in going from one place to another, made days before he left, and unaccompanied by any acts, are not admissible. *Bangor v. Brunswick*, xxvii. 351. *Corinth v. Lincoln*, xxxiv. 310. *Richmond v. Thomaston*, xxxviii. 232.

371. A party cannot prove, by his own witness, what that witness has said, or what his mind had been, on former occasions. *Law v. Payson*, xxxii. 521.

372. Declarations by a third person, when in the performance of the act, and illustrative of its purpose, are admissible as a part of the act. *Corinth v. Lincoln*, xxxiv. 310.

373. So where they accompany an act, and exhibit the reason or purpose of the act, as where they specify a past transaction as the reason of the present act. *Stewart v. Hanson*, xxxv. 506.

374. Where the plaintiff referred to a third person to show the corner boundary of his land, and such third person pointed out a stump as such corner, the act is admissible. *Chapman v. Twitchell*, xxxvii. 59.

375. Neither the declarations nor certificates of a deceased person, concerning the lots and boundaries of lots between individuals, of which he was never owner nor possessor, are admissible. *Chapman v. Twitchell*, xxxvii. 59.

376. Upon a question of settlement, the declarations of the pauper while in the act of removing, or while doing an act with reference to removing, from one town to another, are admissible to show his intention. *Richmond v. Thomaston*, xxxviii. 232.

377. The general rule is, that the declarations of one, who may be a witness, are inadmissible. *Fisher v. True*, xxxviii. 534.

378. The plaintiff sent money to defendant by mail, which he denied ever having received, and the plaintiff afterwards paid the debt. Subsequently, the plaintiff brought a suit to recover the money. Defendant offered to prove, that in 1836, there were found, in the house where the mail-carrier of the supposed letter lived in 1834, a number of letters secreted in the wall and under the floors of the house, broken open, bearing date in 1834, post-marked at other places than where found, and directed to persons in another town:—*Held*, that this evidence or any declarations by such mail carrier, unaccompanied by any acts, was inadmissible. *Pike v. Crehore*, xl. 503.

See PAUPER, 48, 74, 75.

#### VIII. OTHER PRINCIPLES.

379. Under R. S. of 1841, c. 69, the defendant being the maker of a negotiable note, cannot prove usury by his own oath in defence, where the plaintiff is indorsee. *Myrick v. Hasey*, xxvii. 9.

380. The mere fact that the taxes were paid to a collector, who had a warrant for their collection, affords no satisfactory proof of payment by duress. *Smith v. Readfield*, xxvii. 145.

381. Where evidence is introduced by letters or documents, the whole, and not extracts or portions of them, are received. *Hammatt v. Emerson*, xxvii. 308.

382. If a paper be recognized by a witness as containing a correct statement of the facts as they were known to him at the time, when it was first presented to him, he may be permitted to use it for the purpose of refreshing his recollection, although it had been drawn up by another person more than twenty years after the events transpired. *Chamberlain v. Sands*, xxvii. 458.

383. A party cannot discredit his own witness, except when he is obliged to call him as an attesting witness. *Chamberlain v. Sands*, xxvii. 458.

384. The mere receipt of interest for a stipulated time, from the principal by the creditor, after the maturity of the note, is not sufficient evidence of an agreement to give further credit. *Mariner's Bank v. Abbott*, xxviii. 280.

385. In an action upon a poor debtor's bond, any legal proof showing the debtor's ability to pay the debt, or some part thereof, is admissible. *Call v. Barker*, xxviii. 317.

386. Parol evidence is admissible to show that a note of \$500, payable on demand with interest, was the one secured by said mortgage, although such a note does not correspond with the one described in the mortgage. *Bourne v. Littlefield*, xxix. 302. *Sweetser v. Lowell*, xxxiii. 446.

387. A memorandum upon the margin of an indorsed negotiable note, representing it to be the "property of A. B.," is not, of itself, proof that A. B. had any interest in it at the time of the trial. *Sibley v. Lumbert*, xxx. 253.

388. A partial payment of a note, to avoid the statute of limitations, may be proved by parol. *Sibley v. Lumbert*, xxx. 253.

389. A firm was dissolved, upon an agreement that one of the members should assume and pay the company debts. A creditor, upon being informed of the facts, replied that he was satisfied with it:—*Held*, that such reply was not evidence, from which a jury could find that he had discharged the other member of the firm. *Chase v. Vaughan*, xxx. 412.

390. On motion to set aside a verdict for excessive damages, it is not competent to prove, by the jurors, their mode of computation. *Hovey v. Luce*, xxxi. 346.

391. There is no positive rule of law, which prohibits a jury, in a criminal case, from convicting upon the unsupported testimony of a *particeps criminis*. *State v. Cunningham*, xxxi. 355.

392. The memoranda of a surveyor of lumber are not of themselves evidence. *Ayer v. Sawyer*, xxxii. 163.

393. The rule, that testimony collateral to the issue cannot be contradicted, is confined to testimony introduced in cross-examination, by the party who purposes to contradict it; and does not apply to testimony introduced by the other party. *State v. Sargent*, xxxii. 429.

394. Where a charter authorized the erection of a dam, subject to the duties enumerated in the charter; and the selectmen of the town were constituted the exclusive judges, (in controversies between the corporation and other parties,) of the performance of such duties; in an action to recover damages for the insufficiency of the sluice, &c., testimony tending to prove matters within the jurisdiction of the selectmen as judges, is inadmissible. *Bassett v. Carleton*, xxxii. 553.

395. A witness will not be permitted to testify what course of action he should have pursued, if certain specified acts had not occurred. *Palmer v. Pinkham*, xxxiii. 32.

396. In an action against the maker of a note, payable on time, brought by an indorsee, who obtained it for value, and before maturity, and without knowledge of mistake in its date, evidence that the note bore date, by mistake, earlier than the day upon which it was actually made, is inadmissible to establish a defence that the action was prematurely brought. *Huston v. Young*, xxxiii. 85.

397. It is not competent for an objecting party, in order to exclude a witness, to prove that the witness has made admissions of his interest in the case. *Stuart v. Lake*, xxxiii. 87.

398. In the defence of a criminal prosecution, for a defect in a highway, established by the County Commissioners, it is not competent to prove irregularities in their preliminary proceedings, even by their own records. *State v. Madison*, xxxiii. 267.

399. Where testimony is conflicting, the rule is not to be prescribed to the jury, that a fact is to be considered unproved, when the opposing witnesses are equal in number, means of knowledge, capacity and credit. *Sweetser v. Lowell*, xxxiii. 446.

400. A party may introduce a paper, drawn up in the handwriting of the other, though not signed, with a view to connect it with other evidence, to establish a disputed fact. *Bartlett v. Mayo*, xxxiii. 518.

401. Leading questions to a witness are such as suggest answers favorable

to the party asking them; and the Court will, in some cases, allow them. *Parsons v. Bridgham*, xxxiv. 240.

402. In some cases, a party may show, by his own affidavit, the loss of a paper, in order to the introduction of secondary evidence. *Mason v. Tallman*, xxxiv. 472.

403. Such affidavit is not admissible as evidence of any fact for the consideration of the jury. *Mason v. Tallman*, xxxiv. 472.

404. When a question, put by one party, has been but partly answered by the witness, the residue of the answer may be elicited by the other party. *Mason v. Tallman*, xxxiv. 472.

405. If one party introduce a mutilated paper, the other party is not bound to explain the mutilation. *Boothby v. Stanley*, xxxiv. 515.

406. If one of the conditions in a mortgage be, that the mortgager shall maintain the mortgagee at a house upon the land, and the mortgagee have the right of electing to be maintained upon the land, such election may be proved by parol. *Norton v. Webb*, xxxv. 218.

407. Where the plaintiff referred to a third person, to show the corner boundary of his land, and such third person pointed out a stump as such corner, the act is in the nature of an admission, and admissible in evidence against the plaintiff. *Chapman v. Twitchell*, xxxvii. 59.

408. Traditionary evidence, in relation to the boundaries of a private estate, when not identical with one of a public nature, is inadmissible. *Chapman v. Twitchell*, xxxvii. 59.

409. The authenticity of a plan cannot be established by certificates made upon it by one deceased, who was not the surveyor. *Chapman v. Twitchell*, xxxvii. 59.

410. Rules of evidence may be changed by the Legislature without violating any of the provisions of the constitution. *State v. Day*, xxxvii. 244.

411. The Act of 1853, c. 49, § 9, making proof of a delivery of intoxicating liquors sufficient evidence of sale, when an unlawful sale is alleged, is applicable to support an indictment for being a common seller under c. 211, § 8, of the Act of 1851. *State v. Day*, xxxvii. 244.

412. On the trial of an indictment for larceny from a store, the goods alleged to have been stolen may be exhibited to the witness, the supposed owner, before he is required to describe the goods he has lost. *State v. Lull*, xxxvii. 246.

413. And such witness may use a schedule, prepared by his clerk, under his direction and inspection, by which to refresh his recollection as to the prices of the goods stolen. *State v. Lull*, xxxvii. 246.

414. Where evidence tends to show that a trunk, containing stolen goods, is the property of the defendant, and in it are found envelopes directed to him, together with a pardon, purporting to come from the Governor of another State:—*Held*, such envelopes and pardon are admissible. *State v. Lull*, xxxvii. 246.

415. In a writ, containing only the money counts, the proofs are limited to the bill of particulars. *Gooding v. Morgan*, xxxvii. 419.

416. To show charges, made against him within six years from the commencement of his action upon an account, the plaintiff cannot give in evidence a set-off made and filed by the attorney of defendant, which was withdrawn by leave of Court before trial. *Theobald v. Stinson*, xxxviii. 149.

417. But if such set-off had been personally filed by defendant, or the items had been made in his handwriting, the act, and contents of the paper, may be admissible. *Theobald v. Stinson*, xxxviii. 149.

418. The mere fact, that the existence of a road is proved to the jury, will not authorize them to infer that it was of such width as to make it safe and convenient. *Hunt v. Rich*, xxxviii. 195.

419. If a person, on trial for an alleged offence, offer no evidence of his good character, no legal inference can arise, from such omission, that he is guilty of the offence charged, or that his character is bad. Nor will such omission authorize an argument against his general character. *State v. Upham*, xxxviii. 261.

420. Notice to the drawer, of the non-payment of a draft, cannot be proved by the affidavit of an attorney at law, who afterwards deceased, without evidence that the act was in discharge of some official duty, and in the ordinary course of business. *Bradbury v. Bridges*, xxxviii. 346.

421. A party, who uses a deposition in a trial, cannot corroborate it by the disclosure of the same witness, made and sworn to before two justices of the peace and quorum. *Smith v. Morgan*, xxxviii. 468.

422. Where personal property was leased to the defendant, and persons agreed upon to appraise a portion of it, their appraisal of the whole of it, without other proof, is not evidence in an action against him, although it is stipulated that the whole shall be appraised. *Great Pond M. & A. Co. v. Buzzell*, xxxix. 173.

423. A judgment against a principal in trespass for the act of the servant, rendered *after* the pleading of the general issue in the action against the servant, is admissible under that plea. *Emery v. Fowler*, xxxix. 326.

424. The testimony of a deceased witness is receivable, when the witness can state the substance of the whole testimony relating to the issue, but not otherwise. *Emery v. Fowler*, xxxix. 326.

425. The certificate of two justices of the peace and quorum, is evidence only of the facts required to be inserted therein by R. S., 1841, c. 148, § 31. *Winsor v. Clark*, xxxix. 428.

426. A witness, employed by a creditor to appear at the time of the disclosure of his debtor, cannot testify as to his intentions, of bringing a suit upon the bond, formed at the time of the hearing. *Winsor v. Clark*, xxxix. 428.

427. Wilfully corrupt and false testimony on a material point, does not so absolutely discredit the witness as to any other fact to which he may testify, that, as matter of law, the jury are bound to disregard his testimony. *Parsons v. Huff*, xli. 410. *Merrill v. Whitefield*, xli. 414.

428. A question, which may be answered in a manner to disclose evidence given before a grand jury, is inadmissible. *State v. Knight*, xliii. 11.

429. A witness cannot be called upon to state his testimony, given on a former occasion, in a trial where the same evidence is relevant. *State v. Knight*, xliii. 11.

430. The result of scientific knowledge and experience is proper for the consideration of the jury. The Court will not determine the truth or absurdity of such facts. *State v. Knight*, xliii. 11.

431. A diagram, approximating a perfect representation, when exhibited by

a witness qualified to give explanation, may be used to illustrate his meaning. *State v. Knight*, XLIII. 11.

See ARBITRATION, 56.

NOTICE, &c., 6.

## EXCEPTIONS.

- I. IN WHAT CASES EXCEPTIONS LIE, AND WHAT ARE GROUNDS OF EXCEPTIONS.
- II. IN OTHER RESPECTS.

### I. IN WHAT CASES EXCEPTIONS LIE, AND WHAT ARE GROUNDS OF EXCEPTIONS.

1. Exceptions will not be sustained on the ground that the presiding Judge erred in declining to give a certain instruction to the jury, on request, unless the exceptions show that the instruction requested was applicable to the case. *Thomaston v. Warren*, XXVIII. 289.

2. If part of an instruction requested be correct, and a part erroneous, the whole request may be declined. *Thomaston v. Warren*, XXVIII. 289. *Tibbetts v. Baker*, XXXII. 25. *Bryant v. Crosby*, XL. 9.

3. Where the exceptions state, merely, that the "witness was objected to," and admitted, without stating any cause of objection, no question is presented for the consideration of this Court. *Glidden v. Dunlap*, XXVIII. 379.

4. Where the instructions to the jury are too general, but the party is not aggrieved thereby, this furnishes no sufficient cause for exceptions. *Copeland v. Copeland*, XXVIII. 525.

5. The District Court may exercise a discretionary power, in ordering or refusing to order judgments of the Court to be set off, when it can be done without a violation of the legal rights of parties. But when a set-off is not authorized by law, and when it would deprive a party of any of his legal rights, exceptions will lie. *Bartlett v. Pearson*, XXIX. 9.

6. An amendment of a writ, by striking out of the account annexed a part of the charges and credits, is within the discretion of the Court, and not ground of exceptions. *Wight v. Stiles*, XXIX. 164.

7. Exceptions do not lie to the rulings of the District Court, in cases appealed from a decision of the County Commissioners. *Banks v. Co. Com. of Y. & C.*, XXIX. 288.

8. An omission of the presiding Judge to charge the jury in relation to certain principles, not then brought to his consideration, and no request having been made for such instruction, forms no ground for exception. *Harpwell v. Phippsburg*, XXIX. 313. *State v. Conley*, XXXIX. 78.

9. The adjudication of the Judge of the District Court as to the facts in a trustee disclosure, is conclusive. And exceptions can be sustained only when it appears from the exceptions themselves, that he misapprehended or mis-

applied the law upon the facts as he had adjudged them to be. *Fletcher v. Clark*, xxix. 485.

10. When a party has pleaded, and a verdict has been found against him, a motion to quash the indictment is not regularly before the Court, and the overruling it is not subject to exceptions. *State v. Barnes*, xxix. 561.

11. When the presiding Judge instructs the jury in a manner appropriate to the facts of the case, and correctly as to the law, though not in terms as requested, there is no cause for exceptions. *State v. Barnes*, xxix. 561.

12. If a Judge rule, as matter of law, that a specified amendment cannot be allowed, it is ground of exceptions. *Rowell v. Small*, xxx. 30.

13. Where a part of the testimony introduced was relevant and a part irrelevant:—*Held*, that although the irrelevant part was seasonably objected to, exceptions to the admission of it could not be sustained. *Whitney v. Cottle*, xxx. 31.

14. Instructions to the jury cannot be excepted to by the party in whose favor they were given. *Rice v. Wallace*, xxx. 252. *Dunn v. Moody*, xli. 239. *Robinson v. White*, xlii. 209.

15. Where the ruling of the Judge is, in itself, correct, it will be sustained, although the reason he gave for it be incorrect. *Prescott v. Hobbs*, xxx. 345.

16. Exceptions from the District Court, upon proceedings under a petition by the County Commissioners, for the location of lots, cannot be sustained. *County Comm'rs v. Spofford*, xxx. 456.

17. Though an inadmissible deposition may have been received, yet, if its contents be not of a character to operate against the excepting party, the verdict will not be disturbed. *Dodge v. Greeley*, xxxi. 343.

18. Positions of law, which a party may contend for at the trial, if not presented as requests for instruction, do not furnish matter of exception, unless they were directly noticed by the Court. *Stowell v. Goodenow*, xxxi. 538. *Osgood v. Lansil*, xxxiii. 360. *State v. Straw*, xxxiii. 554. *Rogers v. Ken. & Pen. R. R. Co.*, xxxviii. 227. *Purrrington v. Pierce*, xxxviii. 447. *Stone v. Redman*, xxxviii. 578.

19. If the defendant, in offering to introduce an authenticated copy of a judgment of a justice of the peace, also embrace proof of facts extraneous to the record, the whole may be rejected. *Tibbetts v. Baker*, xxxii. 25.

20. If the defendant propose to read a letter addressed to himself from the plaintiff, and one from himself in reply, it is no ground of exception, that he was required first to read the one written by himself. *Mudge v. Pierce*, xxxii. 165.

21. Exceptions to an instruction given to the jury, on the ground that there was no evidence calling for such instruction, must show that fact, in order to be sustained. *Bryant v. Couillard*, xxxii. 520.

22. Where the Judge refers to the jury a question of law, there is no ground for exceptions, if it clearly appears that the jury decided it correctly. *Osgood v. Lansil*, xxxiii. 360. *Woodman v. Chesley*, xxxix. 45.

23. Every position, respecting the admissibility of testimony, should be distinctly presented to the presiding Judge for decision, before it can be made the subject of exceptions. *Lee v. Oppenheimer*, xxxiv. 181. *White v. Chadbourne*, xli. 149.

24. To the decisions of a Judge, in matters at his discretion, exceptions do not lie. *Moody v. Hinckley*, xxxiv. 200. *Rumsey v. Bragg*, xxxv. 116.

*Cummings v. Buckfield B. R., R.*, xxxv. 478. *Thornton v. Blaisdell*, xxxvii. 190. *State v. Lull*, xxxvii. 246. *Achorn v. Matthews*, xxxviii. 173. *State v. Conley*, xxxix. 78. *G. P. M. & Agri. Co. v. Buzzell*, xxxix. 173. *Franklin Bank v. Stevens*, xxxix. 532. *Emerson v. McNamara*, xli. 565. *Smith v. Gorman*, xli. 405.

25. If answers are rejected by a Judge, because given in answer to questions which he supposed to be leading, it is ground of exceptions, if, in fact, the questions were not leading. *Parsons v. Bridgham*, xxxiv. 240.

26. Exceptions cannot be sustained for the wrongful admission of testimony explaining a written contract, if the explanation shows nothing different from the legal import of the contract itself. *Ladd v. Dillingham*, xxxiv. 316.

27. Where an instruction assumes a fact, which was issuable and in dispute upon the evidence, and material to a right decision of the question before the jury, exceptions are sustainable. *Linscott v. Trask*, xxxv. 150. *Whipple v. Wing*, xxxix. 424.

28. Instructions, however erroneous, can form no available ground of exceptions, if, in fact, the excepting party sustained no injury. *Neal v. Paine*, xxxv. 158. *Beeman v. Lawton*, xxxvii. 543. *Whidden v. Seelye*, xl. 247.

29. Exceptions do not lie to a statement, made by the Judge to the jury, of what facts, in his view, the evidence proved. *Hayden v. Bartlett*, xxxv. 203.

30. Where an insurer, summoned as trustee of the insured, pleaded that the burning was by design or gross carelessness, and the trustee's counsel admitted the burden of proof to be on him, as in criminal cases: — *Held*, to be no ground for exception, that the instruction to the jury required the matter relied on in defence to be proved beyond any reasonable doubt. *Butman v. Hobbs*, xxxv. 227.

31. Exceptions lie to the erroneous rulings of the presiding Judge; and that is the only relief provided for. *Palmer v. Pinkham*, xxxvii. 252.

32. When it appears, from the finding of the jury, that the plaintiffs have no title to the property sued for in trover, their requested instructions become immaterial. *Walker v. Blake*, xxxvii. 373.

33. On a preliminary question to the Court, whether or not the action is rightfully prosecuted in the name of the city, the admission of illegal testimony furnishes no ground of exception, if there was sufficient legal proof to warrant the decision given. *Portland v. Rolfe*, xxxvii. 400.

34. In an action, where the plaintiff's right to recover rests on the ground that the defendant had violated his special agreement, the refusal to instruct the jury that a committee, representing the plaintiffs, were competent to complain of the infraction of the contract, is not open to exceptions, inasmuch as it is immaterial. *Ken. & P. R. R. Co. v. White*, xxxviii. 63.

35. A party who is not allowed to prove a fact which could have no influence on the determination of the cause, or aid the party proposing such proof, has no grounds of exception. *Leisherness v. Berry*, xxxviii. 80. *Hanson v. Kelley*, xxxviii. 456.

36. In bastardy process, the question of the competency of the complainant, as a witness, is one of fact to be determined by the Judge, and no exceptions lie to his determination. *Jackson v. Jones*, xxxviii. 185.



37. If a Judge omits to give instructions upon the effect of testimony, to which his attention was not called, such omission is no ground of exceptions. *Purrrington v. Pierce*, xxxviii. 447. *Stone v. Redman*, xxxviii. 578.

38. Under c. 246, § 12, of Acts of 1852, the decisions of the presiding Judge, of cases withdrawn from the jury by consent, in all matters of law, are open to exceptions only when such right is reserved. *Andover v. Reed*, xxxix. 41. *Hersey v. Verrill*, xxxix. 271. *Roxbury v. Huston*, xxxix. 312. *Dunn v. Hutchinson*, xxxix. 367. *Mason v. Currier*, xliii. 355.

39. A part of an instruction, though in itself erroneous, which, when connected with the remainder, leaves no ground for supposing the jury were misled by it, and other instructions on the same point, clearly proper, furnish no ground of exceptions. *Oxnard v. Swanton*, xxxix. 125.

40. Whether exceptions lie to an order of the Judge, directing a re-commitment of the report of commissioners in partition; *quere*. *Ham v. Ham*, xxxix. 216.

41. Objections to the allowance of amendments of writs, unauthorized by law, can only be made available by exceptions. *Herrick v. Osborne*, xxxix. 231.

42. By c. 246, § 13, of the Acts of 1852, all petitions for review may be heard and determined by the presiding Justice, at any term held for the trial of jury cases, "subject to exceptions to any matter of law by him so decided and determined." *Moody v. Larrabee*, xxxix. 282.

43. The facts established by the testimony on such petition, and the ascertainment of those facts, are solely for the determination of the presiding Justice, to which exceptions do not lie. *Moody v. Larrabee*, xxxix. 282.

44. To the answer responsive to a question put without objection, no exceptions can be taken. *State v. Nutting*, xxxix. 359.

45. Inferences from the testimony are for the jury; and the Court is not authorized to instruct the jury that the evidence is insufficient. *Cook v. Brown*, xxxix. 443.

46. Suggestions made by the presiding Judge, in the course of his charge to the jury, as to any facts in the case, but which are left to their determination, are not open to exceptions. *Phillips v. Veazey*, xl. 96.

47. Although auditors neglect and refuse to report the facts by them found, when requested by one of the parties, no exceptions lie. *Closson v. Means*, xl. 337.

48. Exceptions cannot be sustained to a refusal to give instructions which have already been substantially given. *Dunn v. Moody*, xli. 239.

49. Whether a party has used such due diligence as will entitle him to file items of cost, after the expiration of a year from the rendition of judgment, is a question of fact, to be determined by the Judge at *Nisi Prius*, whose decision is not open to exceptions. *Farley v. Bryant*, xli. 400.

50. If there is not sufficient evidence in a case to authorize a jury to find the fact upon which a request for an instruction is based, the Judge is not bound to give the instruction, whether in itself correct or not. *Pen. R. R. Co. v. White*, xli. 512.

51. When a Judge at *Nisi Prius* denies a petition for review, solely on the ground that the facts presented would not, as matter of law, entitle the petitioner to retain a verdict, should one be found for him by the jury, this Court will determine the question raised by exceptions taken to such ruling. *Emerson v. McNamara*, xli. 565.

52. A deed, having been once properly rejected, cannot be regarded as before the Court for admission, at a subsequent stage of the proceedings, when, by the introduction of other testimony, the foundation had been laid for its reception, unless it is again offered in evidence; and no exceptions can lie in such case. *Melcher v. Merryman*, xli. 601.

53. Unless evidence is before the jury, which, with that offered and excluded, may be sufficient, if found true and viewed in the most favorable light, to establish the proposition for which it was offered, the party offering it cannot be regarded as prejudiced by the exclusion. *Temple v. Partridge*, xlii. 56.

54. A party has no cause of exception to instructions given at his own request. *Robinson v. White*, xlii. 209.

55. The refusal of the Court to order a nonsuit, on motion of the defendant, is not subject to exception; *aliter*, in regard to a ruling of the Court ordering a nonsuit. *Bragdon v. Insurance Co.*, xlii. 259.

## II. IN OTHER RESPECTS.

56. No question, which is not presented by the bill of exceptions, is open for the consideration of this Court. The legal conclusion is, that all other necessary instructions were correctly given. *White v. Jordan*, xxvii. 370. *Moody v. Clark*, xxvii. 551. *Woodman v. Skeetup*, xxxv. 464.

57. In the determination of a question, presented by a bill of exceptions, the Court can consider only the testimony stated in the exceptions. *Brewer v. E. Machias*, xxvii. 489.

58. This Court must consider the rulings or instructions of the Judge at *Nisi Prius*, to be correctly presented by the bill of exceptions; and must give effect to the plain and obvious meaning of the language used. *Codman v. Armstrong*, xxviii. 91.

59. When exceptions have been filed and allowed in the District Court, to any of its preliminary, collateral or interlocutory judgments, directions or opinions, the exceptions must remain among the proceedings of that Court, without being entered in this Court, until the action shall have been prepared, by nonsuit, default or verdict, for its final disposition between the parties, in that Court. *Daggett v. Chase*, xxix. 356. *Witherell v. Randall*, xxx. 168. *Abbott v. Knowlton*, xxxi. 77.

60. Exceptions cannot be sustained from the District Court, if no recognizance was entered into in that Court. And sureties cannot be waived. *Hilton v. Longley*, xxx. 220.

61. Where an action was commenced for the support of a pauper, and a verdict returned for the plaintiffs, and while that action was pending, on a motion for a new trial, the parties instituted another suit for the support of the same pauper, and a verdict was returned for the defendants, and exceptions filed, and, afterwards, the verdict in the first action was set aside;—*Held*, that the Court could only render such judgment in the latter action, as the exceptions authorized. *Bangor v. Brunswick*, xxx. 398.

62. When an action, brought into this Court by exceptions from the District Court, is dismissed because irregularly here, no cost is allowed, unless such dismissal ends the whole controversy. *Sweetser v. Kenney*, xxxi. 288.

63. A motion, made and persisted in, to have the verdict set aside, waives

exceptions to the rulings of the Judge. *Cole v. Bruce*, xxxii. 512. *Ellis v. Warren*, xxxv. 125.

64. Although exceptions from the District Court may have been sustained, yet, if it appear, that there are no facts in the case to be settled by a jury, such final judgment may be entered by this Court as law may require. *Waldo v. Moore*, xxxiii. 511.

65. In a case presented on exceptions, it is the province of the Court to decide, merely, upon the legal correctness of the proceedings excepted to. *Miller v. Goddard*, xxxiv. 102.

66. In this Court, when acting upon exceptions, it is too late to object to the appearance in the Court below, of the attorney who filed the exceptions. *Wilson v. Wood*, xxxiv. 123.

67. After exceptions have been filed and overruled, the prevailing party is entitled to judgment. *Swett v. Stubbs*, xxxiv. 178.

68. Where the respondent alleged inconstancy as an objection to the complainant's being sworn in a bastardy process, and after hearing the proof, the Judge excluded the complainant, it not being stated whether he considered the fact of inconstancy proved or not; exceptions, reciting the evidence, impose upon this Court the duty of deciding the question of fact, and of adjudging thereon whether the exclusion was rightful or not. *Murphy v. Glidden*, xxxiv. 196.

69. Exceptions, though not signed or written out before the rendition of the verdict, are constructively taken and allowed in the progress of the trial, before the jury retire for consultation. *Ellis v. Warren*, xxxv. 125.

70. When afterwards filed and certified, it is done as of the times, (during the trial and before the verdict,) when the respective occasions for taking them occurred. *Ellis v. Warren*, xxxv. 125.

71. The excepting party is bound to produce the documents, which were made a part of the case; and, if a part of them are missing, he cannot complain that a decision should be made upon the case as presented. *Woodman v. Skeetup*, xxxv. 464.

72. Until it be shown, that instructions, given to the jury, upon the evidence, were erroneous, exceptions thereto must be overruled. *Darling v. Dodge*, xxxvi. 370.

73. If, in a bill of exceptions, presented at *Nisi Prius* for allowance, the Judge make wrongful alterations to the injury of the excepting party, a correction can only be had by mandamus. *True v. Plumley*, xxxvi. 466.

74. Exceptions to the report of a master, to avail, must either be supported by the special statements in that report, or by the production of the evidence on which they rest. *Miller v. Whittier*, xxxvi. 577.

75. In a cause to be heard on exceptions, a motion made and filed at the hearing, as to the amount of the judgment for costs, is irregular and cannot be determined. *Bradbury v. Andrews*, xxxvii. 199.

76. Instructions, requested upon a branch of the defence which is controverted, and which assume, that it is not so controverted, are properly rejected. *McCrillis v. Hawes*, xxxviii. 566.

77. So, where the instructions are immaterial. *McCrillis v. Hawes*, xxxviii. 566.

78. More than one suit, where the parties are not the same, cannot be heard in one bill of exceptions. *Mayberry v. Morse*, xxxix. 105.

79. If evidence is admitted against the objection of one of the parties, and subsequently the cause is left to the determination of the presiding Judge, such objections must be considered as waived. *Hersey v. Verrill*, xxxix. 271.

80. County Commissioners, not being parties to the record, in an appeal from their decision, cannot take exceptions to the rulings of the Court. *Ripley v. Co. Comm'rs*, xxxix. 350.

81. A party excepting to the exclusion of testimony offered by him, must produce it to this Court, or it will be presumed that he has no just cause of complaint. *Small v. Sac. N. & Min. Co.*, xl. 274.

82. There are three parties to a bill of exceptions; the parties to the suit and the presiding Judge. After a bill of exceptions has been completed by the allowance and signature of the presiding Judge, it is not competent for him to make material alterations. *GOODENOW, J.*, dissenting. Nor can the parties to the suit, or their counsel, by agreement, make alterations without the assent of the Judge thereto. *Shepard v. Hull*, xlii. 577.

83. If it appear to the Court that such material alterations have been made by one party, with the assent of the Judge, they will be disregarded, and the cause heard upon the bill as it originally stood. *Shepard v. Hull*, xlii. 577.

See COUNTY COMMISSIONERS, 62.

## EXECUTIONS.

- I. OF ISSUING EXECUTIONS, AND THEIR VALIDITY.
- II. LEVIES UPON REAL ESTATE.
- III. LEVIES ON PERSONAL PROPERTY.
- IV. BY WHOM DISCHARGED.

### I. OF ISSUING EXECUTIONS, AND THEIR VALIDITY.

1. If an execution be executed by one having authority, an omission of the direction to the officer may be supplied under leave of Court. And, if there be an unauthorized erasure of the direction, and a new and different one be inserted, the precept may be restored. *Rollins v. Rich*, xxvii. 557.

2. But *bona fide* purchasers having no notice of the fraud, could not be affected by such correction, made after their right accrued, unless the correction can be made from the record. If the record indicate facts which render it probable that every thing has been done necessary to secure the object attempted, and it can be shown that the law was complied with, a purchaser cannot, with such notice, supplant the other party. *Rollins v. Rich*, xxvii. 557.

3. If an execution has been returned satisfied by a levy upon property, which did not belong to the debtor, the creditor's remedy may be by action of debt upon the judgment. *Parlin v. Churchill*, xxx. 187.

4. Where a mother has recovered judgment upon a previous adjudication against the putative father of her illegitimate child, for a sum of money, she may have the execution running against his body; notwithstanding he may have been discharged, upon taking the poor debtor's oath, upon his refusal to

give bond for the performance of the original adjudication. *McLaughlin v. Whitten*, xxxii. 21.

5. The adjudication of the commissioners, appointed by the Court to determine, upon an examination of a debtor's affairs, whether the execution should or should not run against his body, as well as against his property, has the character of a judgment, and cannot be set aside on motion to the Court. *Howe v. Newbegin*, xxxiv. 15.

6. A justice of the peace has authority to renew an execution, at any time within two years from the expiration of his commission, although, at the time of doing it, he may be rightfully exercising the duties of an executive officer. *Jones v. Elliott*, xxxv. 137.

## II. LEVIES UPON REAL ESTATE.

- (a) GENERALLY.
- (b) APPRAISERS, AND THE APPRAISEMENT.
- (c) RETURN OF THE OFFICER.
- (d) RETURNING AND RECORDING THE EXECUTION.
- (e) DELIVERY OF SEIZIN.
- (f) LEVIES ON EQUITIES OF REDEMPTION, LIFE ESTATES, AND INTEREST BY BONDS.
- (g) REDEMPTION, AFTER AN EXTENT, OR SALE ON EXECUTION.

### (a) Generally.

7. Where one tenant in common conveys a portion only of the common property by metes and bounds, a creditor of the grantee, who levies his execution upon an undivided share of the whole common estate, takes nothing by his levy. *Soutter v. Porter*, xxvii. 405.

8. The levy of an execution upon an undivided portion of a part of a farm, such part being specified by metes and bounds, the whole of which farm was holden by the debtor as tenant in common with another, will be considered valid, *it seems*, until the co-tenant has obtained partition and ousted the creditor from the part so levied upon; and until then, an action cannot be maintained on the judgment. *Godwin v. Gregg*, xxviii. 188.

9. And if the officer making the levy, as a coroner, held at the time one commission as a coroner, and another as a justice of the peace, that will not render the levy void. *Godwin v. Gregg*, xxviii. 188.

10. A "clapboard machine and a shingle machine," fastened into a saw mill, to be there used, will pass to the creditor or purchaser, by a levy upon the real estate, or a sale thereof. *Trull v. Fuller*, xxviii. 545.

11. So, if such machines, thus situated and used, are mortgaged to another, and the mortgage is recorded in the town clerk's office, and not in the county registry, a levy upon the land, mill and appurtenances, will pass the machines. *Trull v. Fuller*, xxviii. 545.

12. An attachment of a debtor's real estate, held in common with others, will not prevent a partition by the others. And if such attachment be followed by levy, after the partition, it *must* be made upon the estate set out to the debtor by the partition. *Argyle v. Dwinel*, xxix. 29.

13. Under R. S. of 1841, c. 114, § 33, a levy of real estate, made upon a judgment in a suit, wherein the declaration contained a common money count,

and a count upon an account annexed, which account merely charged balance due on an account and interest, is invalid as against a prior conveyance, although the party claiming under the levy, offered to prove that the conveyance was fraudulent and void. *Saco v. Hopkinton*, xxix. 268.

14. Neither is the levy aided by a bill of particulars, and not attached to the writ, though placed and continued within its folds. *Saco v. Hopkinton*, xxix. 268.

15. Where a judgment in a writ of entry had been recovered, and the demandant had paid the betterments allowed by the jury, if afterwards, an execution against the defendant, and in favor of a third person, be levied by a sale of his right in the land, in virtue of possession and improvement, the sale conveys no right in the land, or money with the clerk, for betterments. *Parlin v. Churchill*, xxx. 187.

16. A levy upon real estate is void, if it embrace more of the debtor's land than was sufficient, at the appraisal, to satisfy the execution and the officer's charges for his fees, and the expenses of the levy. *Boyd v. Page*, xxx. 460.

17. A levy, seasonably made after judgment, has relation to the time of the attachment. *Brown v. Williams* xxxi. 403.

18. A levy of land by the number of its lot, and by reference to the deed from the debtor's grantor, is a sufficient description by metes and bounds. *Cowan v. Wheeler*, xxxi. 439.

19. A levy, which, with the debtor's land, also embraces a portion of another's, will pass the debtor's land. *Grover v. Howard*, xxxi. 546.

20. Where one erected buildings upon another's land, and with his permission, and the owner afterwards conveyed to him by deed, the land and buildings, the grantee cannot claim against a levying creditor of the grantor, that his erection of the buildings made them personal property. *Grover v. Howard*, xxxi. 546.

21. In a levy, an exception of "the buildings," will exclude from the levy the land under them, and so much adjacent land as is necessary for their use. *Grover v. Howard*, xxxi. 546.

22. In a levy, the taking of land to an amount greater, by one cent and three mills, than the creditor was entitled to, will not vacate the levy; for *de minimis lex non curat*. *Dwinel v. Soper*, xxxii. 119.

23. A levy of land, to which the execution debtor, at the time of the levy, had no title, gives to the creditor no rights in the land which the debtor may subsequently acquire. *Freeman v. Thayer*, xxxiii. 76.

24. A debtor's life estate in land belonging to his wife, passes to the creditor, by a levy of the fee. *McKeen v. Gammon*, xxxiii. 187.

25. If, under a will, a devisee take an estate in fee, subject to a life trust for the benefit of another, his creditor, by a levy of his estate in remainder, can take no enjoyment of the income, until the death of the devisee. *Butterfield v. Haskins*, xxxiii. 392.

26. A levy of mortgaged land on execution against the mortgagee, who is not in possession, and has never entered to foreclose, passes no title. *Coombs v. Warren*, xxxiv. 89. *Randall v. Farnham*, xxxvi. 86. *McLaughlin v. Shepherd*, xxxii. 143.

27. A levy, "reserving and excepting such incumbrances and conveyances as have been made prior to the levy," is too indefinite and uncertain. *Thayer v. Mayo*. xxxiv. 139.

28. A levy of land, appraised at an amount, exceeding the sum to be collected by fifty-two cents, is void. *Thayer v. Mayo*, xxxiv. 139.

29. The levy of an execution against the husband, upon his life estate in the land of his wife, was not defeated by the Act of 1844, unless the wife prove, "that [the title did not in any way come to her from the husband during coverture. *Eldridge v. Preble*, xxxiv. 148.

30. A levy of the undivided part of the interest, which the execution debtor held in a tract of land jointly with others, is void, unless it specify what the debtor's interest was. *Rawson v. Lowell*, xxxiv. 201.

31. The right of re-entry for a breach of condition in a conveyance of land, pertains only to the grantor and his legal representatives; and it is not included among the rights mentioned in R. S. of 1841, c. 94, § 1, and cannot be taken on execution. *Bangor v. Warren*, xxxiv. 324.

32. No particular ceremony is required in seizing real estate. It is not essential that an officer should enter upon the land during any stage of the proceedings in a levy. *Fitch v. Tyler*, xxxiv. 463.

33. The R. S. of 1841, c. 94, § 11, applies when the debtor's apparent or known title extends only to an undivided part of the estate. *Howe v. Wildes*, xxxiv. 566.

34. Where the record shows that the debtor's title covers the whole land in fee, a levy of the whole will transfer whatever title he may have, though it be but a life estate in an undivided part. *Howe v. Wildes*, xxxiv. 566.

35. A levy, appraised at an amount, exceeding the sum to be collected, by fourteen cents, is void. *Glidden v. Chase*, xxxv. 90.

36. *It seems*, that a levy is unsustainable, if the excess in value of the land taken be more than the value of any coin, which, by statute, is a legal tender. *Glidden v. Chase*, xxxv. 90.

37. The judgment of a Court having general jurisdiction of the subject matter of the suit, and purporting to be recovered against an inhabitant of the county where it is rendered, is a sufficient foundation for a levy, although there may have been some error in the date of the writ, the service thereon and the term of the Court, at which the action should have been entered. *Woodman v. Smith*, xxxvii. 21.

38. An execution against a railroad corporation, may be levied upon the property of a stockholder, to the amount of his stock, for debts contracted during the time he was a stockholder. *Chaffin v. Cummings*, xxxvii. 76.

39. To the validity of a levy made on such an execution upon the property of an individual, it must appear:—

1st. That he was a shareholder to the amount levied. And, it is not essential, that such fact be shown by the corporation records, or by the officer's return; but it may be shown by parol.

2d. That the levying officer, forty-eight hours before the levy, gave him notice of the amount of the debt and of an intention to make the levy. It is not essential, however, that the levy be made at the end of the forty-eight hours; but, if made twenty-four hours after, it is sufficient. Neither will the notice become ineffectual by an intermediate payment of a part of the debt.

3d. That there was no attachable property of the corporation. Of which fact, the levying officer's return upon the execution, that he cannot find such property, is conclusive between the parties. *Chaffin v. Cummings*, xxxvii. 76.

40. In a controversy, as to the validity of such a levy, the stockholder cannot object, that the creditor had reserved and secured usurious interest in his contract with the corporation. *Chaffin v. Cummings*, xxxvii. 76.

41. All the proceedings in the levy of an execution have reference to the time when the land was taken; and interest on the debt of the judgment creditor can only be computed to that time. *Brown v. Lunt*, xxxvii. 423.

42. A levy of the debt, including the interest on the execution to the time of its completion, which was two days after the land was taken, is invalid. *Brown v. Lunt*, xxxvii. 423.

43. A levy, made for one dollar more than the amount of the debt, costs, interest, fees for executions, and costs of levy, is invalid. *Webster v. Hill*, xxxviii. 78.

44. Where a judgment debtor exclusively owns a parcel of land, a levy by his creditor upon an undivided portion of it, is invalid. *Brown v. Clifford*, xxxviii. 210.

45. But a levy upon a less proportionate undivided portion of a debtor's land, than he owns, will divest his title to the part levied on. *Brown v. Clifford*, xxxviii. 210. *Rawson v. Clark*, xxxviii. 223.

46. The validity of a levy, as between the debtor and creditor, is not impaired by the omission to have the incumbrance of a mortgage, known to be existing, deducted from the appraised value of the land. *Brown v. Clifford*, xxxviii. 210.

47. It is not essential that the appraisers' certificate or the officer's return should state the amount of the debt, fees and charges, of the execution levied. This may be made certain on inspection; and unless more land is taken than enough to satisfy the debt and costs, as taxed, the levy is valid. *Rawson v. Clark*, xxxviii. 223.

48. Where the share of an heir's estate was levied on by the administratrix, a subsequent partition among all the heirs, by the Judge of Probate, is not a waiver of the levy. The heirs had no legal interest in the land levied on that could be waived. *Furlong v. Soule*, xxxix. 122.

49. A creditor who blends his claims accruing before and after a voluntary conveyance of his debtor, and levies on the estate conveyed, has only the rights of a subsequent creditor. *Quimby v. Dill*, xl. 528.

50. The interest acquired by a judgment creditor in his levy on land, is not attachable, during the year allowed by law for its redemption; nor will a levy of it as his property, during that time, prove available, although it may not be redeemed. *Kidder v. Orcutt*, xl. 589.

51. In a levy on the rents and profits of a life estate, under R. S. of 1841, c. 94, § 14, the debtor is entitled to a specific statement of what has been done, in order that he may see whether more of his property has been taken, than an amount equal to the debt and costs. *Bachelor v. Thompson*, xli. 539.

52. If the amount exceeds by only a few cents the exact sum required, the levy will be void. So, also, when the return is so indefinite, that the amount cannot be computed. *Bachelor v. Thompson*, xli. 539.

53. An attachment on mesne process, of a right and equity of redemption, is sufficient to sustain a levy upon the estate in fee, if, at the time of the levy, the incumbrance created by the mortgage had been relieved. *Jewett v. Whitney*, xliii. 242.



54. A levy, reserving an estate less than a fee, of a part of the premises set off, is void in relation to the particular tract, from which the reservation is made. *Jewett v. Whitney*, XLIII. 242.

55. Where an execution was extended upon a lot of land, upon which was a grist-mill and privilege, and the appraisers, after having described said premises in their return, used the words "exclusive of the grist-mill now standing on said premises," the levy cannot be upheld; whether it was the intention of the appraisers to exclude the grist-mill as personal estate, or to reserve the mill and land under the same for the debtor, as an estate in fee defeasible by the destruction of the mill. *Jewett v. Whitney*, XLIII. 242.

See ATTACHMENT, 22.

(b) *Appraisers, and the appraisement.*

56. Where it appeared in a levy, that the names of the persons sworn as appraisers, and the names signed as appraisers to the certificate of appraisal, were identical; and where the officer's return named the same persons as appraisers, with the exception of an initial letter, for a middle name in one, and expressly referred to the certificate of the oath and the signatures of the appraisers, as the same persons named in their return:—*Held*, that the evidence of identity was sufficient. *Rollins v. Rich*, XXVII. 557.

57. In a levy, in which the levying officer was a deputy sheriff, one, who is also a deputy of the same sheriff, is competent as an appraiser. *Grover v. Howard*, XXXI. 546.

58. In levying an execution against two joint debtors upon real estate, held by them in common, it is not necessary to appraise each one's share separately. *Dwinel v. Soper*, XXXII. 119.

59. The requirements of R. S. of 1841, c. 94, §§ 6 and 24, are complied with, if the appraisers' certificate shows that they viewed the land, and appraised and set it off, and if the officer's return refer to the appraisers' certificate, and state that they "appraised" the same "as therein appears." *Fitch v. Tyler*, XXXIV. 463.

60. It is not requisite that the appraisers should be residents of the county in which the land lies. *Fitch v. Tyler*, XXXIV. 463. *Woodman v. Smith*, XXXVII. 21.

61. The appraisers' certificate need not state the amount of the debt, and fees and charges of the execution levied. *Rawson v. Clark*, XXXVIII. 223.

(c) *Return of the officer.*

62. Where the officer's return, after stating the necessary facts in regard to a levy, also states that two of the appraisers signed their certificate, "the other declining to sign the same," it need not state the cause of the refusal of such appraiser. *McLellan v. Nelson*, XXVII. 129.

63. In making sale of an interest in virtue of a bond, under Act of 1829, c. 431, it is not necessary for the officer to return, that he had given a deed to the vendee under his sale. It is sufficient, that it appears he had done so by the production of the deed. *Whittier v. Vaughan*, XXVII. 301.

64. Amendments of his return, in such case, may be made by an officer, by leave of Court, no rights of third persons intervening, if, before they were

made, the party, on looking at the return, could not have misunderstood, that the proceedings had been substantially what the amended return shows them to have been. *Whittier v. Vaughan*, xxvii. 301.

65. The title by levy, must be proved by the return of the officer. *Jackson v. Woodman*, xxix. 266. *Lumbert v. Hill*, xli. 475.

66. A return of satisfaction, made upon an execution, by an officer, will not bar an action of debt on the judgment, if it be proved, that in fact, no such satisfaction was made. *Parlin v. Churchill*, xxx. 187. *Hutchinson v. Greenbush*, xxx. 450.

67. The return of the officer, in a levy of real estate, that the appraisers were discreet and disinterested men, is conclusive of that fact. *Grover v. Howard*, xxxi. 546.

68. Where one of the joint execution debtors lived upon the land, owned in common with the other, who lived within half a mile of it, and the officer, in his return of the levy, certified, that at ten o'clock in the forenoon, he left at the dwellinghouse of each, a written notice, stating that he had seized the land, and requesting them to choose an appraiser, to assist in the appraisement to be made at five o'clock in the afternoon of the same day, and that it was a reasonable notice:—*Held*, that the Court could not decide that the time was not sufficient. *Dwinel v. Soper*, xxxii. 119.

69. The officer's return that the appraisers were disinterested, is, in legal effect, an affirmation that they were not within the sixth degree of relationship to either of the parties; and is conclusive between the parties. *McKeen v. Gammon*, xxxiii. 187.

70. The officer's return that the appraisers were sworn, is sufficient, if it refer to indorsements, made upon the execution by the magistrate and by the appraisers, containing certificates that the requisite oath was taken. *Fitch v. Tyler*, xxxiv. 463.

71. The "specified time" to be given by an officer to the debtor, in which to appoint an appraiser, is to be mentioned in the notice, but need not be stated in the return. *Fitch v. Tyler*, xxxiv. 463.

72. What is a "reasonable" time to be allowed to the debtor, in which to choose an appraiser, is submitted to the judgment of the officer. *Fitch v. Tyler*, xxxiv. 463. *Howe v. Wildes*, xxxiv. 566.

73. A return, that the debtor "refused" to appoint an appraiser, is a sufficient substitute for an allegation that any notice was given to the debtor. *Fitch v. Tyler*, xxxiv. 463. *Howe v. Wildes*, xxxiv. 566.

74. If the return does not state by whom one of the appraisers was appointed, the omission is fatal, unless supplied. And the person who was the levying officer, on motion to the Court, may supply the omission, though not in office. *Fitch v. Tyler*, xxxiv. 463.

75. Where the return upon an execution, issued upon a judgment recovered against a husband and wife, for the debt of the wife before her marriage, describes the real property levied on, as "the property of said" judgment debtors, "being her right of inheritance;" the levy embraces the husband's freehold and the wife's reversion, and is a valid transfer of her land. *Moore v. Richardson*, xxxvii. 438.

76. A return by the officer, that the debtor was out of the State, and that he had left a notice at his last and usual place of abode within the county, his family still residing there, confers no authority upon the officer to choose an appraiser for him. *Wellington v. Fuller*, xxxviii. 61.

77. The officer's return need not state the amount of the debt and fees and charges of the execution levied. *Rawson v. Clark*, xxxviii. 223.

78. The time of the completion of a levy of land, is shown in the return of the officer by the date of his acts and doings in relation thereto. *Balch v. Pattee*, xxxviii. 353.

79. And although he certifies that the levy was completed at a subsequent time, such certificate is nugatory, when nothing was done or necessary to be done by him to complete it. *Balch v. Pattee*, xxxviii. 353.

79. Although the return does not contain the words "after viewing the same," yet, if it appears that the premises were shown to the appraisers, the statute is satisfied. *Huntress v. Tiney*, xxxix. 237.

80. A statute title, by levy, must always be perfect; that is, every thing made necessary by the statute to pass the property, must appear by the return of the officer and the record thereof, to have been done. *Lumbert v. Hill*, xli. 475.

81. Where an execution is levied on the rents and profits of a life estate, under R. S. of 1841, c. 94, § 14, the return should either state, in dollars and cents, the precise value of the rents and profits set off, or else there should be a reference to other papers that will make the amount certain. *Bachelder v. Thompson*, xli. 539.

82. The statement in the return, that the rents and profits set off for a certain time will be sufficient, in the estimation of the appraisers, to satisfy the execution and all fees, is not sufficiently definite. *Bachelder v. Thompson*, xli. 539.

See OFFICER, 42.

(d) *Returning and recording the execution.*

83. A levy of an execution on real estate, not recorded within three months, will be invalid, except against the debtor and his heirs, and those having actual knowledge thereof. *Stevens v. Bachelder*, xxviii. 218. *Balch v. Pattee*, xxxviii. 353.

84. The record of the return of the officer, of the levy of an execution on real estate, without his signature to the return, is not such a record as will make the levy effectual against subsequent purchasers. *Stevens v. Bachelder*, xxviii. 218.

85. The register of deeds is the proper officer to certify the copy of the records of a levy on execution. *Gray v. Garnsey*, xxxii. 180.

86. When an execution and levy thereof have been returned and recorded, there can be no other notice of the previous proceedings by which subsequent attaching creditors or purchasers can be affected. *Lumbert v. Hill*, xli. 475.

(e) *Delivery of seizin.*

87. In a levy of execution on real estate, a delivery of seizin to the creditor, after the appraisement, is essential to the passing of the title. *Jackson v. Woodman*, xxix. 266.

88. If the creditor refuse to receive seizin, the previous proceedings have no effect toward satisfying the execution. *Jackson v. Woodman*, xxix. 266.

89. The receiving of seizin, if ratified by the judgment creditor, is effectual,

although the person receiving it had no previous authorization. *Cowan v. Wheeler*, xxxi. 439.

(f) *Levies on equities of redemption, life estates, and interests in virtue of bonds.*

90. In making sale of an interest by virtue of a bond, under Act of 1829, c. 431, it is not necessary for the officer to return that he had given a deed to the vendee. It is sufficient that it appears by the production of the deed. *Whittier v. Vaughan*, xxvii. 301.

91. By an officer's sale of an equity of redemption, the purchaser takes a right to the immediate possession of the land, except as against the mortgagee. *Abbott v. Sturtevant*, xxx. 40.

92. It is not indispensable that the officer's deed of an equity of redemption should be made on the day of the sale. If made so soon afterwards, that it may be regarded as a part of the sale transaction, the deed, and the purchaser's right under it, will have relation back and take effect from the time of the sale. *Abbott v. Sturtevant*, xxx. 40.

93. Prior to the Act of 1847, c. 21, the interest which an obligee or his assignee has in a conditional bond for the conveyance of real estate, was to be made available to creditors by a sale on execution. *Houston v. Jordan*, xxxv. 520.

94. If, after an attachment in a suit against an obligee or his assignee, the defendant therein shall have obtained a conveyance pursuant to the bond, the title by the Act of 1847 may be transferred by a levy, to which the previous attachment shall impart its usual validity. *Houston v. Jordan*, xxxv. 520.

95. Such an attachment, however, can give no validity to a levy, if the conveyance have been made, not to the execution debtor, but to some other person. *Houston v. Jordan*, xxxv. 520.

96. Where an execution is levied on the rents and profits of a life estate, under R. S. of 1841, c. 94, § 14, the debtor is entitled to a specific statement of what has been done, in order that he may see whether more of his property has been taken than an amount equal to the debt and costs. *Bachelor v. Thompson*, xli. 539.

(g) *Redemption, after an extent or sale on execution.*

97. The right to redeem real estate, levied on execution, is limited to one year from the levy. *Boothby v. Bangor Com. Bank*, xxx. 361.

98. R. S. of 1841, c. 94, § 28, merely provides an additional mode of ascertaining the amount; which is by equity. And such process must have the amount ascertained, and brought into Court, before the year for redemption has expired. *Boothby v. Bangor Com. Bank*, xxx. 361.

99. The right which a mortgager has to redeem, against an execution sale of his right of redemption, is limited to one year from the sale. *Cushing v. Thompson*, xxxiv. 496.

100. Where the mortgager and his tenants have retained the possession, without paying any rent to the purchaser, though it was demanded of them, the mortgager, when redeeming, cannot require of the purchaser an account for rents. *Cushing v. Thompson*, xxxiv. 496.

101. If the purchaser, for his own benefit, obtained a policy of insurance upon a building standing on the land, and within the year received the insurance money, the building having been burnt:—*Held*, that in redeeming the sale, the mortgager was not entitled to the insurance. *Cushing v. Thompson*, xxxiv. 496

102. The receipt, by a levying creditor, of the amount of his claim, though after the expiration of the year allowed for redemption, vacates the title derived from the levy. *Randall v. Farnham*, xxxvi. 86.

### III. LEVIES ON PERSONAL PROPERTY.

103. Personal property having been duly advertised for sale on execution, and a postponement for two days having been made by proclamation, without the posting of advertisements, the officer would not be liable in trespass to the debtor for selling the property at the postponed time, if the postponement, both as to mode and time, was made at his request. *Wilton M. Co. v. Butler*, xxxiv. 431.

104. An omission, by the officer, to affix his signature to the return of a sale of property on execution, may be amended, on proof to the Court, that the return was according to the truth. *Wilton M. Co. v. Butler*, xxxiv. 431.

### IV. HOW, AND BY WHOM DISCHARGED.

105. An attorney at law has no authority, in virtue of his general employment, to discharge an execution, unless upon payment of its whole amount. *Jewett v. Wadleigh*, xxxii. 110.

## EXECUTORS AND ADMINISTRATORS.

- I. APPOINTMENT, POWERS, DUTIES AND LIABILITIES.
- II. SUITS BY AND AGAINST.
- III. EXECUTORS DE SON TORT, AND FOREIGN EXECUTORS AND ADMINISTRATORS.

### I. APPOINTMENT, POWERS, DUTIES AND LIABILITIES.

- (a) INTEREST IN, AND AUTHORITY OVER, THE ESTATE, AND SALES THEREOF.
- (b) REPRESENTATION OF INSOLVENCY, AND PROCEEDINGS.
- (c) GENERALLY.

(a) *Interest in, and authority over, the estate, and sales thereof.*

1. Where an administrator *de bonis non*, with the will annexed, is appointed upon the death of an executor, who was also appointed by the will trustee of a fund arising out of the estate of the testator, such administrator does not succeed to the rights or duties of trustee of such fund. *Knight v. Loomis*, xxx. 204.

2. A conveyance of land by an administrator, under a license, after the time limited by law for the operation of the license, is void. *Chadbourne v. Rackliff*, xxx. 354. *Mason v. Ham*, xxxvi. 573.

3. To such a conveyance, the limitation of five years, provided in c. 52 of the Acts of 1836, does not apply. *Chadbourne v. Rackliff*, xxx. 354.

4. Where an estate is devised to executors *eo nomine*, in trust, the devise is made to the official, not to the individual person; and the whole trust vests in those who accept the office and become executors of the will. *Put. F. School v. Fisher*, xxx. 523.

5. Where an estate is so devised, or where the executors, by the will, have a power to sell, coupled with an interest in trust, a conveyance by survivors or by those who alone accept the trust, is valid. *Put. F. School v. Fisher*, xxx. 523.

6 By a devise to the executor, of the testator's property, real and personal, in trust, for the purpose of creating a cash fund, he takes a fee in trust in the real estate. But if he did not take the fee, he would still have an implied power to execute the trust. *Put. F. School v. Fisher*, xxx. 523.

7. One died intestate, leaving children, of whom J. was one. J. died intestate, of adult age, never having been married, and never having received his distributive share in his father's estate;—*Held*, that share was payable to J's administrator, and not to his brothers and sisters. *Storer v. Blake*, xxxi. 289.

8. By the Act of 1789, an administrator of a mortgagee had authority to assign the mortgage; and it could be done by a quitclaim deed, if the intent thereby to convey the title be apparent. *Crooker v. Jewell*, xxxi. 306.

9. A decree of the Probate Court, appointing an administrator, is conclusive, unless appealed from. *Clark v. Pishon*, xxxi. 503.

10. A person to whose order money, belonging to an estate, was paid before an administrator was appointed, is accountable, without previous demand, to the administrator, although the money or the avails of it never came to his actual use. *Clark v. Pishon*, xxxi. 503.

11. The administrator of a widow, when a pension, under the Act of Congress of June 19, 1842, is paid to him, receives it merely in trust for her. *Shirley v. Walker*, xxxi. 541.

12. If the owner of a building, erected upon the land of another by consent, have conveyed it in fraud of creditors, the right of his administrator is simply that of selling it. *Bullen v. Arnold*, xxxi. 583.

13. To make up the six years, necessary to give a right to betterments, the occupation by the administratrix cannot be added to that of the intestate. *Bullen v. Arnold*, xxxi. 583.

14. If an intestate have conveyed land, without any consideration, in trust, for his own benefit, the administrator is not entitled to a re-conveyance. *Crocker v. Smith*, xxxii. 244.

15. The law gives an administrator no title to the land of his intestate, but merely a right to sell the same in a prescribed mode and for specified purposes. *Crocker v. Smith*, xxxii. 244.

16. Administrators have authority to submit to referees any controverted personal claims, affecting the estates under their care. *Kendall v. Bates*, xxxv. 357.

17. Under R. S., of 1841, c. 107, the executor or administrator of a de-

ceased co-partner, is bound to include in his inventory the co-partnership estate for distribution. *Cook v. Lewis*, xxxvi. 340.

18. The prior right of administering upon a co-partnership estate belongs to the survivor, upon his giving bond according to the statute. Until he have given such bond, he cannot dispose of any part of the company estate. *Cook v. Lewis*, xxxvi. 340.

19. If he decline to give such bond, the executor or administrator of the deceased partner, on giving the prescribed bond, is to take the partnership estate into his own possession for administration. *Cook v. Lewis*, xxxvi. 340.

20. In such case, a sale of partnership goods, by the survivor, is unauthorized and void; and notes given therefor are without consideration. *Cook v. Lewis*, xxxvi. 340.

21. Of such goods the administrator is entitled to the immediate possession; and the purchaser, therefore, is not chargeable as trustee in any suit against the surviving partner. *Cook v. Lewis*, xxxvi. 340.

22. A bond, given by one in his capacity as administrator, to convey land of his intestate by warranty deed, is unauthorized, and will not bind the estate. *Mason v. Ham*, xxxvi. 573.

23. The provision of the will, that the personal estate should remain in the hands of executors, only interposed a trustee in whom the legal estate vested; but did not affect the duration and magnitude of the estate. *Stone v. North*, xli. 265.

See WILL, 25, 30.

(b) *Representation of insolvency and proceedings.*

24. Where a claim, not belonging to the contingent class, is disallowed by commissioners of insolvency, and is thereupon prosecuted and recovered in a suit at law, the creditor is not barred by any statute of limitation from having it, at any time afterwards, added to the list of allowed claims. *Greene v. Dyer*, xxxii. 460.

25. His right to have it so added does not depend upon any reservation of funds, ordered by the Judge of Probate for contingent claims. *Greene v. Dyer*, xxxii. 460.

26. Neither is that right impaired by a distribution of the surplus assets, without any order from the Probate Court, among the heirs and legal representatives of the deceased, the estate, though represented insolvent, having proved to be solvent. *Greene v. Dyer*, xxxii. 460.

See INSOLVENT ESTATES.

(c) *Generally.*

27. The four years limitation mentioned in R. S. of 1841, c. 146, § 29, applies only to suits brought, and not to proceedings in the Probate Court. *Greene v. Dyer*, xxxii. 460.

28. The contingent claims, for which, by R. S. of 1841, c. 109, § 13, funds are to be reserved by order of the Judge of Probate, are those concerning which it is uncertain whether they will ever be converted into debts. *Greene v. Dyer*, xxxii. 460.

29. Where the commissioners of insolvency disallow a claim, and a judgment is afterwards obtained for the same, the administrator may be compelled to add it to the list of debts. *Greene v. Dyer*, xxxii. 460.

30. Although it is proper for an administrator to charge himself for the amount at which debts, due to the intestate, were appraised, such charge is not conclusive of his liability for that amount. *Weed v. Lermond*, xxxiii. 492.

31. An administrator is not authorized to take such debts to his own use at the appraisal, nor bound to account for them at the appraisal. His responsibility is that of reasonable diligence in the collection of them. *Weed v. Lermond*, xxxiii. 492.

32. One, having been appointed as executor and also as trustee, by a will, and having given bond as executor, will be deemed to have declined the appointment as trustee, unless he give bond in that capacity also. *Williams v. Cushing*, xxxiv. 370. *Deering v. Adams*, xxxvii. 264.

33. Where a testamentary trustee of the residuum of the testator's estate has declined to act in that capacity, another person may be appointed by the Judge of Probate. And the person so appointed will have the rights of a residuary trustee, in relation to suits upon probate bonds. *Williams v. Cushing*, xxxiv. 370. *Deering v. Adams*, xxxvii. 264.

34. If there be a residuary trustee, the executor is to pay the residuary fund to him. *Williams v. Cushing*, xxxiv. 370.

35. If the executor, instead of paying such fund to the trustee, have paid it, as executor, to one having no just claim to it, there is no jurisdiction in the Judge of Probate to allow for such payment in settling the executor's administration account. *Williams v. Cushing*, xxxiv. 370.

36. Such allowance will not preclude the trustee from receiving the amount of the fund, in a suit upon the executor's bond. *Williams v. Cushing*, xxxiv. 370.

37. An administrator, whose intestate owned land incumbered by a mortgage, but which land is not needed to pay debts of the intestate or charges of administration, has no authority to purchase the mortgage; and cannot make it a charge upon the estate. *Young v. Tarbell*, xxxvii. 509.

38. An administrator who sells the real estate of his intestate, under a license, for the payment of debts and incidental charges, and makes use of the avails thereof in his business, is chargeable with lawful interest thereon while thus using it. *Paine v. Paulk*, xxxix. 15.

39. By the Act of Feb. 11, 1789, § 3, all lands levied on by an administrator were held to the sole use and behoof of the widow and heirs of the deceased; and could only be distributed by the Judge of Probate as personal estate. *Furlong v. Soule*, xxxix. 122.

40. Moneys, collected by an executor, for alleged claims of his testator against a foreign government, through the medium of a treaty, are assets in his hands, belonging to the estate. *Thurston v. Lowder*, xl. 197.



## II. SUITS BY AND AGAINST.

(a) WHEN MAINTAINABLE.

(b) PLEADINGS, PRACTICE, EVIDENCE AND COSTS.

(a) *When maintainable.*

41. An action, upon a probate bond, against an administrator, brought by the heirs at law for their own benefit, in the name of the Judge, without an allegation that special leave was granted, cannot be maintained, under R. S. of 1841, c. 113, without proof of a decree ascertaining the amount due to such heirs. *Groton v. Tallman*, xxvii. 68.

42. But such action may be maintained, for the general benefit of the estate, in certain cases, if it be alleged and proved that it was "commenced by the express authority of the Judge of Probate." *Groton v. Tallman*, xxvii. 68.

43. The Judge cannot maintain such suit, on his own motion; but can only authorize it where his consent is necessary. *Groton v. Tallman*, xxvii. 68.

44. After the lapse of a year, an action for a legacy may be maintained by a residuary legatee, against the executor, before a final settlement, if it appear that there are assets in the hands of the executor, to which there are no other and superior claims to their full amount. *Smith v. Lambert*, xxx. 137.

45. And it is not essential that the probate records should show such assets; though such proof would be conclusive upon the executor. After the lapse of a year, there is a presumption that the debts have all been paid. *Smith v. Lambert*, xxx. 137.

46. Any action which survives, against the personal representatives of one party, must be considered as surviving in favor of the legal representatives of the other party. *Valentine v. Norton*, xxx. 194.

47. An action, for the misfeazance of a sheriff or his deputy, does not survive against or in favor of either party. *Valentine v. Norton*, xxx. 194.

48. A testator bequeathed to S. W. \$1700, in trust, to be put at interest, the interest to be paid annually to the plaintiff, and required that S. W. should give "a special bond for the discharge of the trust." S. W. was appointed, and gave bond as executor, but gave no special bond as to the trust fund. He settled all the estate except the \$1700, the interest of which he duly paid to the plaintiff. At his decease, the defendant was appointed administrator *de bonis non*, and gave bond, and charged himself, in his probate account, with \$1700, received of the estate of S. W.:—*Held*, that the defendant did not become trustee of the fund, and had no right to invest the money at interest, and that the plaintiff could not recover of him the annual interest provided in the will. *Knight v. Loomis*, xxx. 204.

49. Where an administrator of a widow, (prior to the Act of March 22d, 1844,) had received pension money, under Act of Congress, June 19, 1842, in trust for a feme covert, she and her husband may maintain an action jointly against him, to recover the same. *Shirley v. Walker*, xxxi. 541.

50. Administrators *de bonis non* cannot maintain a real action in that capacity. *Brown v. Strickland*, xxxii. 174.

51. To maintain an action, disallowed by the commissioners on an insolvent estate, notice must be given of the appeal at the Probate office, after the return of the report of the commissioners, and the action must be commenced within three months from such return. *Pattee v. Lowe*, xxxvi. 138.

52. To charge an executor, on a written contract, to pay a debt due from

his testator, it must be founded upon a sufficient consideration; when the action will lie against him personally, although it was signed in his representative capacity. *Walker v. Patterson*, xxxvi. 273.

53. Where an executor referred a co-partnership matter in dispute, and the balance of the indebtedness of the company beyond its assets was found by the referee, one-third of which the executor agreed, in writing, to pay to a creditor of the company, but did not secure the estate from any further or other liability for the partnership debts: — *Held*, that no action could be maintained on the contract, for want of consideration. *Walker v. Patterson*, xxxvi. 273.

54. After an estate has been represented insolvent, a creditor cannot maintain an action against the administrator, unless his claim has been filed before the commissioners, though the estate should prove to be solvent. *McNally v. Kerswell*, xxxvii. 550.

55. An administrator, whose intestate gave a negotiable promissory note to defendant, is not chargeable as his trustee, though the note may have been presented against the estate by the promisee. *Commercial Bank v. Neally*, xxxix. 402.

56. If, when service of the writ is made upon an administrator as trustee of defendant, the latter was surety on sundry notes of the intestate, but had paid nothing, it is no indebtedment, and the trustee process is unavailing. *Commercial Bank v. Neally*, xxxix. 402.

57. Even an attachment of defendant's property, on suits against him as such surety, would not constitute a debt, either absolute or contingent. *Commercial Bank v. Neally*, xxxix. 402.

58. Suits against executors or administrators must be commenced within four years, from the time they gave bond and notice of their appointment, except in certain cases specified in the statute. *Pettingill v. Patterson*, xxxix. 498. *Thurston v. Lowder*, xl. 197.

59. A creditor, having a claim against an estate which is not due until the four years have expired, can have no remedy against an executor, unless it has been filed in the Probate office within that period. *Pettingill v. Patterson*, xxxix. 498.

60. Hence, where an obligee in a bond, given by the testator, has recovered judgment for its penalty and execution for such sum as was due within the four years from the time he accepted the trust, *scire facias* will not lie after the four years have elapsed, to obtain execution for subsequent installments. *Pettingill v. Patterson*, xxxix. 498.

61. Upon the refusal of the promisor to fulfil an agreement in writing, for a valuable consideration, to convey real estate, the administratrix of the promisee may maintain either a bill in equity for specific performance, or an action at common law, to recover damages for its breach. *Godfrey v. Dwinel*, xl. 94.

62. Where an executor received moneys through claims against a foreign government, within four years from his appointment, a part of which was claimed by plaintiff, and that it never was the property of the testator: — *Held*, that an action against the executor therefor, commenced after four years from his appointment, could not be maintained. *Thurston v. Lowder*, xl. 197.

63. An administrator of an insolvent estate is entitled to the aid of the equity powers of the Court, to obtain property, belonging to the intestate, which creditors may lawfully claim in satisfaction of their debts, when the

same is held in fraud; but his remedies at law must first be exhausted. *Fletcher v. Holmes*, XL. 364.

64. By the Act of 1850, c. 159, an action commenced before the expiration of a lien, and brought to enforce it, may be prosecuted to judgment and execution against an administrator or executor, notwithstanding the death and insolvency of the debtor. *Pratt v. Seavy*, XLI. 370.

65. An agent of another to sell real estate, must account to the administratrix of his principal, on demand, for the proceeds of the sale; otherwise, he is liable in damages. *Wheeler v. Haskins*, XLI. 432.

(b) *Pleadings, practice, evidence and costs.*

66. There were annuitants and residuary legatees under a will. One of the legatees, being indebted to the estate, gave his note therefor to the executor; and afterwards transferred all his interest in the estate to one of the annuitants, who soon afterwards purchased in all the rights of the other annuitants and legatees. In an action upon the note, by the administrator *de bonis non*, for the use of such purchaser:—*Held*, that said purchases were no defence. *Wilkins v. Patten*, XXX. 429.

67. In an action by an administrator, the general issue, or plea in bar, admits him to be administrator. If the defendant would deny that the plaintiff is administrator, he must plead in abatement. *Clark v. Pishon*, XXXI. 503.

68. In such action, the general issue may be rejected, if it purport to reserve to the defendant a right of denying that the plaintiff is administrator. *Clark v. Pishon*, XXXI. 503.

69. Under the general issue, the defendant cannot introduce the probate records, for the purpose of showing that there were such irregularities in the probate proceedings as would vacate the plaintiff's appointment. *Clark v. Pishon*, XXXI. 503.

70. *Scire facias*, and not debt, is the remedy for an administrator *de bonis non*, upon an unsatisfied judgment, recovered by the original administrator. *Paine v. McIntire*, XXXII. 131.

71. An inventory of real property, duly returned to the probate office, is *prima facie* proof that no other land belonged to the estate. *Reed v. Gilbert*, XXXII. 519.

72. Rights to a set-off in a suit, wherein an executor or administrator is a party, are the same that would have existed, if all the parties interested had continued in life. *Adams v. Ware*, XXXIII. 228.

73. Joint executors or administrators, representing the testator or the intestate, are one person in law. And an act by one of them, relating to the goods of the estate, is the act of all. *Shaw v. Berry*, XXXV. 279.

74. An administrator is bound by the admissions which his intestate has made. *Weston v. Weston*, XXXV. 360.

75. Proofs of waste and mal-administration are not competent to sustain an action under either of the exceptions mentioned in R. S. of 1841, c. 109, § 28, in regard to estates represented insolvent. *Pattee v. Lowe*, XXXVI. 138.

76. By R. S. of 1841, c. 113, § 16, whenever it shall appear, in any suit against an administrator, that he has neglected or refused to account, upon oath, for such property of his intestate as he has received, after he has been cited by the Judge of Probate for that purpose, execution shall be awarded

against him for the full value of whatever personal property of the deceased has come to his hands, without any discount, abatement or allowance for charges of administration or debts paid. *Williams v. Esty*, xxxvi. 243.

77. Whenever such default has been committed by an administrator, a suit is maintainable against his sureties upon the administration bond. *Williams v. Esty*, xxxvi. 243.

78. And the amount of the inventory of the personal property is *prima facie* evidence of the sum for which execution shall be awarded against him. *Williams v. Esty*, xxxvi. 243.

79. If the sureties for such default are prosecuted in separate suits, execution will be issued for the full amount of the personal estate in each; but one only can be satisfied. *Williams v. Esty*, xxxvi. 243.

80. To charge an executor, on a written contract, to pay a debt due from his testator, it must be founded upon a sufficient consideration; when an action will lie against him personally. Proof of the consideration must be furnished by the party who would enforce it. *Walker v. Patterson*, xxxvi. 273.

81. The joint liability of partners is severed by their death; and a claim against their estate cannot be prosecuted against their administrator, in one action, although the same individual should administer on both estates. *McNally v. Kerswell*, xxxvii. 550.

82. Where the creditor would enforce a lien claim on logs, by an attachment under the provisions of c. 216 of the Acts of 1851, against the administrator of an estate represented insolvent, the nature of the claim must appear in the writ. *McNally v. Kerswell*, xxxvii. 550.

83. As an answer to a plea of statute of limitations, an offer to prove that the cause of action was fraudulently concealed, must appear, in the report of it to the Court, to have embraced all the requirements of the statute in that particular. The time when the fraudulent concealment was discovered must not be left in doubt. *Thurston v. Lowder*, xl. 197.

84. For a creditor's proportion of a sum of money, found due from an executor on settlement of his account with the Judge of Probate, under the decree of that Court, an action on the executor's bond is the remedy, and not assumpsit. *Wass v. Bucknam*, xl. 289.

85. Where the administrator of an insolvent estate attempts, through equity, to reach the avails of property belonging to the estate fraudulently conveyed, it must appear:—

1st. That the suit is for the benefit of all the creditors whose claims are established:—

2d. That the creditors have obtained judgment, or that their claims have been allowed by the commissioners of insolvency, and not objected to by the administrator:—

3d. That the administrator has availed himself of the provision of law for citing before the Probate Court the suspected parties:—

4th. That he has brought a suit at law for the recovery of the property so conveyed:—and

5th. That he, or those whom he represents, has exhausted the remedies at law against the parties for aiding or assisting in fraudulently concealing the property of the estate. *Fletcher v. Holmes*, xl. 364.

## III. EXECUTORS DE SON TORT, AND FOREIGN EXECUTORS AND ADMINISTRATORS.

86. Letters of administration, granted in another State, give no power of administering property of the deceased in this State. *Smith v. Guild*, xxxiv. 443.

87. The taking of property into possession, under a just claim of right, will not charge upon a person any liability as executor *de son tort*. *Smith v. Porter*, xxxv. 287.

88. A purchase from an executor *de son tort*, knowing him to be such, will not charge the purchaser as an executor *de son tort*. *Smith v. Porter*, xxxv. 287.

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EXEMPTION OF PROPERTY.

See ATTACHMENT, 2, 9, 12, 13.

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EXPERTS.

See EVIDENCE, 109—118.

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EX POST FACTO LAWS.

See CONSTITUTIONAL LAW, 12—19.

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EXTENT.

See EXECUTION.

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FALSE PRETENCES.

See CHEATING BY FALSE PRETENCES.

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FEES.

See OFFICER. CONSTITUTIONAL LAW, 29.

## FELONY.

1. R. S. of 1841, c. 167, § 4, providing that an accessory before the fact "may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice," does not abrogate the distinction between principal and accessory, but clearly preserves it. *State v. Ricker*, *xxix.* 84.

2. A "substantive felony" is that which depends on itself, and is not dependent on another felony, which can only be established by the conviction of the one who committed it. *State v. Ricker*, *xxix.* 84.

3. Whether such intended offence be a felony or misdemeanor, is not to be ascertained by the common law classification of crimes, but by our statute classification. *State v. Smith*, *xxxii.* 369.

4. Where death ensues by the act of one in the pursuit of an unlawful design, without intent to kill, it is murder or manslaughter, as the intended offence was felony or a misdemeanor. *State v. Smith*, *xxxii.* 369. *Smith v. State*, *xxxiii.* 48.

5. Any crime, liable to be punished in the State prison, is a felony. It belongs to the class of felonies, although by statute made punishable in the alternative, either in State prison, or the County jail, or by fine. *State v. Smith*, *xxxii.* 369. *Smith v. State*, *xxxiii.* 48.

6. The using of any means, with intent to destroy the child of which a female is pregnant, and the destroying the child thereby, before its birth, unless done to preserve the life of the mother, constitute a felony. *Smith v. State*, *xxxiii.* 48.

## FEME COVERT.

See MARRIED WOMAN.

## FENCE.

1. A man's cattle are not lawfully upon another man's land, unless by consent of its owner or some one having an interest in it, though unfenced, and they pass there directly from the highway, upon which they were permitted to go at large by vote of the town. *Lord v. Wormwood*, *xxix.* 282.

2. Although the owner of unfenced land, adjoining a highway, may not recover damages for cattle passing from such highway, upon which they were permitted to go by a vote of the town, still, he may remove them and guard against their ingress. *Lord v. Wormwood*, *xxix.* 282.

3. The latter part of the provision of R. S. of 1841, c. 30, § 6, applies to those cases, where there had been a division of the fence between owners of adjoining lands; and, until a division takes place, there cannot be said to be any neglect. *Lord v. Wormwood*, *xxix.* 282. *Sturtevant v. Merrill*, *xxxii.* 62. *Webber v. Closson*, *xxxv.* 26.

4. If cattle, being thus wrongfully upon land, pass therefrom, to and upon the plaintiff's adjoining unfenced lot, not bordering upon the highway, he may maintain trespass therefor against their owner; for he was under no obligation to fence against them. *Lord v. Wormwood*, xxix. 282.

4. By the common law, every man is bound, at his peril, to keep his cattle on his own land. *Lord v. Wormwood*, xxix. 282. *Webber v. Closson*, xxxv. 26.

5. By the Act of 1842, c. 9, § 6, a railroad company is not bound to maintain fences on the lines of their road, except where the same passes through "inclosed or improved land." *Perkins v. Eastern R. R. Co.*, xxix. 307.

6. If an injury to another's cattle happen, through want of such fences upon such lands, it is not legally imputable to the negligence of the company. *Perkins v. Eastern R. R. Co.*, xxix. 307.

7. If cattle escape from an adjoining close or highway, (upon which they were not lawfully,) to the railroad and are injured, the company is not liable. *Perkins v. Eastern R. R. Co.*, xxix. 307.

8. If there has been no obligatory division fence between adjoining lots of land, the owner of each lot is bound to keep his cattle from crossing the line, or he will be liable in trespass. *Sturtevant v. Merrill*, xxxiii. 62.

9. And, though the owners of the lands may have maintained a line-fence, by severally building such parts as were satisfactory to each other. *Sturtevant v. Merrill*, xxxiii. 62.

10. The plaintiff's wrongful removal of fence, built by the defendant, will not constitute a license for defendant's cattle to cross the undivided line, after there has been such a lapse of time as to give the defendant a reasonable opportunity of rebuilding. *Sturtevant v. Merrill*, xxxiii. 62.

11. From the maintenance of a partition fence, jointly, by the owners of adjoining lands, *for however long a period*, there can arise no prescriptive obligation upon either of them to maintain any separate and distinct part of it. *Webber v. Closson*, xxxv. 26.

12. Therefore, if, through a defect in such joint fence, sheep, rightfully upon one side of it, escape into the field upon the other side, and do damage, they are liable to be impounded. *Webber v. Closson*, xxxv. 26.

13. Railroad corporations, required by their charter to keep and maintain legal and sufficient fences on the exterior lines of their road, for neglecting that duty are liable to a forfeiture of a hundred dollars per month, by c. 41, of Acts of 1853. *Norris v. Androscoggin R. R. Co.*, xxxix. 273.

14. And they are also liable in an action at common law, to any person suffering injury in his property thereby. *Norris v. Androscoggin R. R. Co.*, xxxix. 273.

15. And said Act, being remedial and for the protection of property peculiarly exposed by the introduction of locomotive engines, applies to corporations existing before its passage. *Norris v. Androscoggin R. R. Co.*, xxxix. 273.

16. Plaintiff's horse, by reason of a defective fence, well known to the company, escaped from his pasture upon the track, and was injured by the engine: *Held*, the railroad company were responsible, notwithstanding the engineer was in the exercise of due care, and that the fence was originally imperfectly built by the plaintiff for the company. *Norris v. Androscoggin R. R. Co.*, xxxix. 273.

## FENCE VIEWERS.

1. The adjudication of fence viewers, as to the sufficiency and value of a fence built by one party, is invalid, unless previous notice of the time and place of their meeting had been given to the other party. *Harris v. Sturdevant*, xxix. 366.

2. Without proof of a legal adjudication by the fence viewers, no action can be maintained under R. S. of 1841, c. 29, § 9, to recover double the value of a partition fence assigned to the defendant, but for his neglect built by the plaintiff. *Harris v. Sturdevant*, xxix. 366.

3. In relation to partition fences, the power of the fence viewers extends only to the assignment of the respective portions of the dividing line, and the fixing of the time within which to build the fence. *Longley v. Hilton*, xxxiv. 332.

4. An order, that one of the adjoining owners should build a fence upon a portion of the line assigned to the other, and exonerating the latter from building upon such portion, is unauthorized; and neither obligates the former to perform, nor relieves the latter from the duty to build the portion upon that portion of the line. *Longley v. Hilton*, xxxiv. 332.

5. Such an order, though incorporated into the original assignment, is merely void, and cannot vitiate the assignment itself. *SHEPLEY*, C. J., dissenting. *Longley v. Hilton*, xxxiv. 332.

6. An assignment of partition fence, by fence viewers, must be recorded in the town clerk's office of the town where the land is situated, or a neglect by one of the co-terminous proprietors, to build the part assigned him, will not render him liable to the other in double the expense of building. *Ellis v. Ellis*, xxxix. 526.

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FERRY.

1. A ferry is a liberty to have a boat upon a river for the carriage of men and horses for a reasonable toll. Its limits are high water mark upon either shore. *State v. Wilson*, xlii. 9.

2. It necessarily requires such privileges as will make it effectual. Passengers may be received and landed at the margin of the water upon the shore, at all times of tide, and in all states of the river. When the space between high and low water marks is in part or wholly bare, passengers may pass over the shore without hindrance, and without liability to the riparian proprietor. *State v. Wilson*, xlii. 9.

3. An establishment of a ferry on the Penobscot river in 1798, by the Court of Sessions, was neither an enlargement nor a restriction of the right to use the shore of said river, including the right of mooring vessels thereon, and of discharging and taking in their cargoes, under the proviso of the Colonial Ordinance of 1641. *State v. Wilson*, xlii. 9.



## FINES.

See JUSTICE OF THE PEACE.

## FIREWARDS.

Under R. S. of 1841, c. 33, § 11, in the absence of any firewards, if one only of the selectmen is present at a fire, he is vested with the authority to direct any building to be pulled down or demolished, as he may judge necessary, to prevent the spreading of the fire. *Frankfort v. County Commissioners*, XL. 389.

## FIREWOOD.

In the business of buying or selling firewood, one class is denominated hard wood and another soft wood. And the jury are to determine to which class a particular species belongs. *Darling v. Dodge*, XXXVI. 370.

## FISHERIES.

1. By special Act, of March 4th, 1826, "to regulate the alewife fishery in Bristol," the fish committee chosen by the town are to decide and determine whether the sluice-ways are good and convenient; and so long as they act within the sphere of their duty they are not trespassers. No one has the right to oppose them in the performance of their duties; and their decision is conclusive, unless they are guilty of corruption, or palpably mistake their duties. *Fossett v. Bearce*, XXVII. 117.

2. The Act of Massachusetts, of March 6th, 1802, "to regulate the shad and alewife fishery in the town of Warren," is in force, so far as to authorize the choice of a fish committee with power to recover forfeitures under the second section thereof. *Spear v. Robinson*, XXIX. 531.

3. Under an article in a warrant, at a legal meeting in the town of Warren, "to choose selectmen, assessors and all other officers that the law requires, or may be thought necessary," a fish committee may be legally chosen. *Spear v. Robinson*, XXIX. 531.

4. The choice of one who was not a freeholder is merely void. *Spear v. Robinson*, XXIX. 531.

5. The Act of 1826, regulating the alewife fishery in Bristol, repealed all the Acts then in force on the same subject, so far as operative in that town. *Bearce v. Fossett*, XXXIV. 575.

6. Under that Act, the town was annually to choose a fish committee, whose right and duty it should be to keep open, in the dams upon the stream, proper and sufficient sluice-ways for the passage of alewives. *Bearce v. Fossett*, xxxiv. 575.

7. Since that Act, no other persons than the fish committee can adjudicate upon the sufficiency of any sluice-way, or open any sluice-way in another's dam, or abate any dam as a nuisance for the absence or insufficiency of a sluice-way, in that town. *Bearce v. Fossett*, xxxiv. 575.

8. By the common law, the people have the right of fishing in the sea, creeks or arms thereof, as a public piscary, and may not be restrained, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath acquired a propriety exclusive of that common liberty. *Moulton v. Libbey*, xxxvii. 472.

9. The shores of the sea and navigable rivers, within the flux and reflux of the tide, belong *prima facie* to the king, and may belong to a subject. But the *jus privatum*, of the owner or proprietor, is charged with and subject to the *jus publicum*, which belongs to the king's subjects. *Moulton v. Libbey*, xxxvii. 472.

10. The grant from Charles I., to Ferdinando Georges, of the Province of Maine, without the proviso, would not necessarily be construed as impairing the common right of piscary. But if any doubt might arise upon this point, there can be none when the saving clause is considered as a part of the instrument, the common right of fishing in the sea and creeks of the Province being expressly saved. *Moulton v. Libbey*, xxxvii. 472.

11. The saving clause is not restricted to the taking of such fish as may be and usually are dried upon the shore; but the words "and drying of their fish and nets ashore" confer a right additional to their common law right. *Moulton v. Libbey*, xxxvii. 472.

12. The common right of fishing is in subordination to the right of navigation; and any wharves or buildings upon flats, consistent with the latter, will be allowed by the latter. *Moulton v. Libbey*, xxxvii. 472.

13. The general term "piscaria" includes all fisheries, regardless of their distinctive character or the method of taking them. *Moulton v. Libbey*, xxxvii. 472.

14. The Legislature have the right to regulate the common rights and privileges of fishing; and R. S. of 1841, c. 61, is designed for the protection and furtherance of the common right, and is valid. *Moulton v. Libbey*, xxxvii. 472.

## FIXTURES.

1. If a mortgager of a mill, after making the mortgage, put into it a shingle machine and apparatus attached to it, it becomes a part of the freehold and passes to the mortgagee after foreclosure. *Corliss v. McLagin*, xxix. 115.

2. Things, personal in their nature, such as belts, looms, carding machines, pickers, jacks, spoolers and dressers, suited and designed for a woolen factory, and placed therein by the owners, although they may be taken away without detriment to the freehold, are fixtures, and, in a partition, ordered among

tenants in common, may be divided as real estate. *Parsons v. Copeland*, xxxviii. 537.

3. By the common law, fixtures and permanent improvements of the freehold, made by a tenant for life, or years, descend to the heirs of the owner. But where made by a tenant at will, or for a term certain, and for his own use, by consent of the landlord, they remain the personal property of the tenant, and, upon his decease, constitute a part of his estate. *Doak v. Wiswell*, xxxviii. 569.

4. A husband's interest in the real estate of his wife is acquired by operation of law; and no buildings erected by him upon the estate, by consent of his wife, will thereby become personal property. The Acts of 1844, 1847, 1848 and 1852, do not conflict with the above principle. *Doak v. Wiswell*, xxxviii. 569.

5. A wooden cistern, standing on blocks in the cellar, and in use; and air-tight stoves, standing in the place where they are used for warming the house, partake of the realty, and the title to them passes by a levy on the house in which they are used. *Blethen v. Towle*, xl. 310.

6. But such stoves not standing in the place where they are used, but stowed away like other movable property, at the time of the levy, do not pass under it. *Blethen v. Towle*, xl. 310.

## FLATS.

1. The ordinance of 1641 provided that the proprietor of land adjoining on the sea or salt water should hold to low water, where the tide does not ebb more than one hundred rods. Though that ordinance was vacated by the abrogation of the Colonial charter, it has by long usage become the law of the State. *Winslow v. Patten*, xxxiv. 25. *Partridge v. Luce*, xxxvi. 16. *Clancey v. Houdlette*, xxxix. 451.

2. The Colonial Ordinance of 1641 presents no rule for apportioning flats to the owners of adjoining uplands. *Treat v. Chipman*, xxxv. 34.

3. The decided cases have not entirely agreed in furnishing a rule for that purpose; but there has been found no serious difficulty in extending the rule laid down in *Emerson v. Taylor*, 9 Greenl. 42, to the flats in the larger rivers and coves of this State. *Treat v. Chipman*, xxxv. 34.

4. It seems, that a title to flats may be acquired by an occupation of them, by one of the owners of the adjacent lands, if continued fifty years, adverse, exclusive, open and notorious, although commenced regardless of any fixed rule of apportionment. *Treat v. Chipman*, xxxv. 34.

5. Such an occupation, with the knowledge of the other owner, may furnish a presumption, that the flats had been apportioned by such owners in accordance with such occupation. *Treat v. Chipman*, xxxv. 34.

6. Fences of stakes or twigs, erected for fish weirs upon flats covered by water, though used only part of each year, may sufficiently evidence an occupation, with claim of ownership of the flats upon which such fences are erected. *Treat v. Chipman*, xxxv. 34.

7. A petition for partition of land bounded on the sea, or bay of the sea,

is a petition for a partition of the flats as well as of the upland. *Partridge v. Luce*, xxxvi. 16.

8. If, in such case, the commissioners have left the flats undivided, their report will be re-committed, for the purpose of having the flats divided, unless it appear to the Court that they are incapable of division. *Partridge v. Luce*, xxxvi. 16.

9. The owners of flats beyond one hundred rods, which are subject to the flux or reflux of the tide, are liable to be disseized by an exclusive and adverse possession. *Clancey v. Houdlette*, xxxix. 451.

10. And such disseizin, continued for twenty years, will divest the owner of his title. *Clancey v. Houdlette*, xxxix. 451.

11. Where upland is conveyed by deed, and by verbal agreement the possession of the flats adjoining is transmitted to the grantee, such possession for twenty years will become a perfect title; and if for less than twenty years, a stranger to the title cannot intermeddle with the possession. *Clancey v. Houdlette*, xxxix. 451.

12. Where upland, on the shore of a river, subject to the flux and reflux of the tide, has been run out into lots, the flats appurtenant, when not otherwise settled by the owners, must be divided, under the Colonial Ordinance of 1641, according to the principle recognized in *Emerson v. Taylor*, 9 Greenl. 42. *Call v. Carroll*, xl. 31.

13. Where such original lots are subdivided, without any stipulations as to the flats, the division of the latter, as between vendor and vendee, must be governed by the same rule; but, in no event, to affect the flats of adjacent proprietors. *Call v. Carroll*, xl. 31.

14. The proprietor of lands adjoining flats, upon or about tide waters, is not precluded from erecting wharves and piers on his own flats, thus preventing the passage of vessels over flats covered by such erections, provided he did not thereby materially interrupt general navigation. *State v. Wilson*, xlii. 9.

15. By the erection of such permanent structures as he may thus lawfully place upon his own premises, he acquires no exclusive right to those portions remaining open. The public have still, in common with him, the right to use the open space, provided they do not interfere with his erections. *State v. Wilson*, xlii. 9.

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### FLOWAGE.

See MILLS, &c.

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### FORCIBLE ENTRY AND DETAINER.

1. This process cannot be sustained, under c. 128, of R. S. of 1841, unless the complaint allege that the relation of landlord and tenant had subsisted between the parties; or unless either the entry or detainer, or both, was forcible. *Woodman v. Ranger*, xxx. 180.

2. If the tenant held over, the thirty days notice to quit, upon which to found a process of forcible entry, &c., cannot be given until the tenancy has been fully terminated; and it must be distinct from, and subsequent to, that by which the tenancy is determined. *Smith v. Rowe*, xxxi. 212. *Dutton v. Colby*, xxxv. 505.

3. It is not necessary to state in the warrant, that the complaint was made on oath. *Lithgow v. Moody*, xxxv. 214.

4. Under the statute giving the process of forcible entry and detainer of "lands and tenements," a tenement includes, as one of its essential elements, an interest in real estate. *Field v. Higgins*, xxxv. 339.

5. For the recovery of a building, standing upon the land of another, by his consent, the process of forcible entry and detainer will not lie. *Field v. Higgins*, xxxv. 339.

6. On an appeal by a respondent from a judgment on process of forcible entry and detainer, the statute requires him to recognize to pay such costs as may be adjudged against him, and such reasonable intervening rent as the justice shall adjudge, in case his judgment shall not be reversed on the appeal. *Dennison v. Mason*, xxxvi. 431.

7. If the recognizance require the appellant to prosecute his appeal with effect; or to pay all costs that may arise in the suit after the appeal; or to pay the intervening rent, it is void. *Dennison v. Mason*, xxxvi. 431.

8. Under c. 128, §§ 1 and 2, of R. S. of 1841, a magistrate has no authority to issue a warrant, unless he receives the complaint on oath. *Labaree v. Brown*, xxxviii. 482.

9. Where the judge of a police court issued a warrant, under this chapter, upon a complaint directed to him, but sworn to before a justice of the peace and of the quorum, of another county, his proceedings are void. *Labaree v. Brown*, xxxviii. 482.

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## FORECLOSURE.

See MORTGAGE.

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## FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

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## FOREIGN LAWS.

1. A contract made by a citizen of Massachusetts, with a citizen of this State, for the payment of money, is not barred by a discharge under the insolvent laws of that State. *Palmer v. Goodwin*, xxxii. 535.

2. A discharge under the insolvency laws of Massachusetts, by a debtor resident there, is no bar to a debt due from him to a person who had never resided there, or to a person, who, at the time of becoming a creditor, was not, and has not since been a resident there. *Bancher v. Fisk*, xxxiii. 316.

3. A contract, legally made in another State, may be enforced in this State, although such a contract would have been illegal in this State. *Torrey v. Corliss*, xxxiii. 333.

4. A statute is not to have a retroactive effect, unless it clearly express that intention. *Torrey v. Corliss*, xxxiii. 333.

See BANKRUPTCY, 19.

EXECUTOR, &c.

## FORFEITURE.

See BOND, 24, 25, 27, 28. EXECUTION. PENALTY. TAXES.

## FORGERY.

See EVIDENCE.

## FRAUD AND FRAUDULENT CONVEYANCES.

- I. FRAUD IN GENERAL AND ACTIONS THEREFOR.
- II. FRAUDULENT CONTRACTS.
- III. FRAUDULENT CONVEYANCES.
- IV. FRAUDULENT SALES OF PERSONAL PROPERTY.

### I. FRAUD IN GENERAL AND ACTIONS THEREFOR.

1. To make a statement of what was contained in a deed of conveyance, and express an opinion of its effect, furnishes no proof that he knowingly made such representations as would make him liable. *Hoyt v. Bradley*, xxvii. 242.

2. It is not necessary that the creditor should first have obtained judgment against his debtor, in order to maintain an action on § 49 of c. 148, of R. S. of 1841. *Aiken v. Kilbourne*, xxvii. 252.

3. It need not appear that the person who knowingly aids a debtor in the fraudulent concealment or transfer of his property, should derive a benefit therefrom to make him liable. *Aiken v. Kilbourne*, xxvii. 252.

4. The rules of law respecting fraudulent conveyances are applicable to mortgages. *Aiken v. Kilbourne*, xxvii. 252.

5. The conduct of a subsequent purchaser or attaching creditor, who has knowledge or notice of a prior conveyance, and afterwards attempts to acquire a title to himself, is fraudulent. *Spofford v. Weston*, xxix. 140. *McLaughlin v. Shepherd*, xxxii. 143.

6. Where the declarations of a subsequent purchaser indicate his disbelief that any prior deed had been given by his grantor, although admitting that such a claim existed by those who professed to hold under it, actual notice cannot be presumed; nor can his conduct, in taking a conveyance to himself, be considered fraudulent. *Spofford v. Weston*, xxix. 140.

7. If, without the consent of the maker, one affix his name as subscribing witness to a note which had been executed without attestation, it will vitiate the note, unless done without an intention to defraud. *Thornton v. Appleton*, xxix. 298.

8. In a suit upon a contract, the plaintiff may be relieved from the statute of limitations, by plea and proof, that the defendant fraudulently concealed from him knowledge of the cause of action; unless he had direct and ample means, in the exercise of ordinary prudence, to detect the fraud. *McKown v. Whitmore*, xxxi. 448.

9. In an action on the 49th § of c. 148 of R. S. of 1841, it must appear that the plaintiff was a creditor at the time of the fraudulent concealment, and of the commencement of the action, and also that he continued to be so between those periods. A continuing conditional liability, however, is sufficient. *Thacher v. Jones*, xxxi. 528.

10. When proposing to purchase land, of which some person, other than the grantor, is in possession, it is the purchaser's duty to inquire into the state of the title. And upon such inquiry, the presumption is, that he ascertains the truth. *McLaughlin v. Shepherd*, xxxii. 143.

11. Fraud cannot be purged by subsequent honesties. *Law v. Payson*, xxxii. 521.

12. Fraud, in the procurement of a deed of land, can be established only upon proof that the grantee or his agent performed some act, or made some representation which was false or deceptive, knowing it to be so. *Larrabee v. Larrabee*, xxxiv. 477.

13. The remedy given by R. S. of 1841, c. 148, § 49, is allowed to creditors only. *Craig v. Webber*, xxxvi. 504.

14. During the pendency of an action of tort, sounding in damages, the plaintiff's right to recover does not constitute him a creditor; but when he recovers judgment in such suit, it is otherwise. *Craig v. Webber*, xxxvi. 504.

15. It is fraud in a person to acquiesce in the use of his name by another, without authority, to the injury of innocent parties; and the law will not permit him to deny the authority. *Forsyth v. Day*, xli. 382.

See EQUITY, 120—123.

EVIDENCE, 232—242.

## II. FRAUDULENT CONTRACTS.

16. An assignment of the debtor's interest in a contract for the conveyance of land, made and received for the purpose of defrauding the creditors of the

assignor, is void against creditors, subsequent, as well as prior, to the assignment. *Whitmore v. Woodward*, xxviii. 392.

17. A contract, obtained by fraudulent representations, cannot be sustained by the fraudulent party, to the injury of the party imposed upon. *Pratt v. Philbrook*, xxxiii. 17.

18. To avoid a contract for misrepresentations, it must appear that a deception was intended and practiced; that it was successful, and operated a damage to the party deceived. *Pratt v. Philbrook*, xxxiii. 17.

19. But Courts will not interfere in his behalf, if he had full means of detecting the fraud, but neglected to do it. *Pratt v. Philbrook*, xxxiii. 17.

20. Neither can such a contract be wholly rescinded, if, prior to the completion of the sale, the purchaser learned the facts and confirmed the bargain. *Pratt v. Philbrook*, xxxiii. 17. *Herrin v. Libbey*, xxxvi. 350.

21. If a party would rescind a contract, obtained by fraudulent representations, he must restore whatever he received under it, within a reasonable time. *Tisdale v. Buckmore*, xxxiii. 461. *Herrin v. Libbey*, xxxvi. 350. *Cushing v. Wyman*, xxxviii. 589. *Emerson v. McNamara*, xli. 565.

22. But the rescission is at the option of the person defrauded. *Herrin v. Libbey*, xxxvi. 350.

23. A lease, obtained by fraudulent representations, will be deemed to be affirmed, if, after having discovered the fraud, he continues to occupy the land; and his only right is to recover the damage occasioned by the fraud. *Herrin v. Libbey*, xxxvi. 350.

24. Where the plaintiff sold property to defendants, for an unnegotiable note against third persons, negotiated under fraudulent representations, the party is liable on an implied guaranty. *Cushing v. Wyman*, xxxviii. 589.

See EVIDENCE, 232—242.

### III. FRAUDULENT CONVEYANCES.

25. Where a fraudulent conveyance is made with the intent to defraud creditors, an action on the case to recover damages for that cause, by one or more of the creditors, cannot be maintained against the parties to such conveyance. *Moody v. Burton*, xxvii. 427.

26. R. S. of 1841, c. 161, § 2, imposing a penalty upon parties to a fraudulent conveyance, has not rendered such a conveyance void, as between parties. *Ellis v. Higgins*, xxxii. 34.

27. A deed of land for a valuable consideration, intended to be absolute, made and received with intent to hinder and delay creditors, is not void as to subsequent creditors, unless some secret trust was reserved for the benefit of the grantor. *Bangor v. Warren*, xxxiv. 324.

28. A sale of property by a debtor is not necessarily to be held fraudulent and void as to creditors, although a contract for his own future support be a part consideration of the sale. *Hapgood v. Fisher*, xxxiv. 407.

29. Such a sale will be sustained, if the vendor retained other property sufficient for the payment of his debts. *Hapgood v. Fisher*, xxxiv. 407.

30. A. took from B. a deed, (which was duly recorded,) to secure a debt, but neither surrendered nor discharged any security. In extending a levy upon the same premises by the creditors of B., A. acted as an appraiser for



the creditors; and subsequently levied an execution in his own favor upon the same premises;—*Held*, the conveyance was void. *Wellington v. Fuller*, XXXVIII. 61.

31. A conveyance, either by deed or mortgage, made by the grantor with intent to defraud his creditors, but without that knowledge on the part of the grantee, is valid. *Davis v. Tibbets*, XXXIX. 279. *McLarren v. Thompson*, XL. 284.

32. And, although the grantee conveys to a third person, and the consideration is paid in fact by the original fraudulent grantor, the legal title passes. *Davis v. Tibbets*, XXXIX. 279.

33. A purchaser of land, for a full consideration, of one who has the recorded title, without knowledge of its being fraudulent, will be protected in his title against the creditors of the fraudulent grantor. *Ersikine v. Decker*, XXXIX. 467.

34. A conveyance in trust, either secret or expressed, of real estate, made or procured to be made by one deeply insolvent, for the purpose of defrauding creditors, is void both as to existing and subsequent creditors. *Smith v. Parker*, XLI. 452.

35. A mortgaged real estate to B.'s assignor, which mortgage was foreclosed by B., with the understanding that A. might redeem after the foreclosure. A. then, with the design of defrauding his creditors, procured B. to convey to C., in trust for A.'s wife and children, and, in certain contingencies, for his own benefit:—*Held*, that the transaction was void as to creditors. *Smith v. Parker*, XLI. 452.

36. Parties to a contract, made in fraud of creditors, may subsequently rescind such contract before the rights of creditors or purchasers have intervened, and where not affected thereby. *Matthews v. Buck*, XLIII. 265.

37. Where such contract is voluntarily rescinded, no disability will attach, by reason of any previous fraud, to any subsequent arrangement in regard to the same property with other persons, or between themselves when third parties have acquired no rights. *Matthews v. Buck*, XLIII. 265.

38. A transfer of real and personal property, absolute in terms, in consideration of a preëxisting debt, and for security of other notes of the grantor, upon which the grantee was liable as surety, and for other debts of the grantor which the grantee promised to pay, may be valid if not designed to defraud or delay creditors by both parties; and it is not within the statute of frauds. *Stevens v. Hinckley*, XLIII. 440.

See EVIDENCE, 232—242.

FRAUD, &c., 4.

#### IV. FRAUDULENT SALES OF PERSONAL PROPERTY.

39. If personal property has been conveyed for the purpose of deterring creditors of the vendor from attaching it, and concurred in by the vendee, such conveyance is a fraud, the remedy for which may be sought in equity. *Hartshorn v. Eames*, XXXI. 93.

40. Fraud practiced by the vendee of a chattel, whereby he obtained the sale and delivery of it to himself, will not authorize the vendor to retake it from one who had subsequently purchased it for value, and without knowledge of the fraud. *Ditson v. Randall*, XXXIII. 202.

41. A sale of goods may be valid between the vendor and vendee, though

made with a design by both of them to defraud the creditors of the vendor. *Thompson v. Moore*, xxxvi. 47.

42. In a suit by the vendee, for the value of the goods, against a third person who had appropriated them to his own use, the plaintiff's fraudulent design in the purchase is no defence. *Thompson v. Moore*, xxxvi. 47.

43. Upon the party alleging fraud is the burden of proving it. *Bartlett v. Blake*, xxxvii. 124.

44. A sale of personal property in exchange for that which is stolen is not *ipso facto* void, but is voidable at the option of the vendor, as between him and the fraudulent vendee, and those claiming under him with notice. *Titcomb v. Wood*, xxxviii. 561.

45. When such fraudulent vendee has transferred the property to a *bona fide* purchaser for a lawful consideration, the vendor cannot reclaim it, or its value, from such innocent purchaser. *Titcomb v. Wood*, xxxviii. 561.

46. When the consideration of such subsequent sale was in part for a pre-existing debt, and in part for the value of property which had been previously stolen by the fraudulent vendor, it cannot be impeached. *Titcomb v. Wood*, xxxviii. 561.

47. Where personal property is mortgaged to secure a debt, the intention of the mortgager to delay creditors, as well as to secure this debt, will not vitiate the mortgage, unless the mortgagee is connusant of, and participant in the design. *McLarren v. Thompson*, xl. 284.

48. A vendor, who has been induced to part with his property by the fraud of another, may rescind the contract and reclaim his property, if, within a reasonable time, he tenders what he received in payment therefor, unless payment was made by the note of the vendee. *Emerson v. McNamara*, xli. 565.

49. Such tender must be made before action brought. *Emerson v. McNamara*, xli. 565.

See EVIDENCE, 232—242.

## FRAUDS, STATUTE OF.

I. TO ANSWER FOR THE DEBT, &c., OF ANOTHER.

II. FOR THE SALE OF LANDS, &c.

III. FOR THE SALE OF GOODS, &c.

IV. UPON AN AGREEMENT, NOT TO BE PERFORMED WITHIN A YEAR.

I. TO ANSWER FOR THE DEBT, &c., OF ANOTHER.

1. To support an action upon a written agreement to pay the debt of another, a consideration must be proved. *Cutler v. Everett*, xxxiii. 201.

2. No inference of a consideration is to be drawn from an agreement, on a separate paper, to be responsible for the payment of a note, of the same date, described as having been given by a third person. *Cutler v. Everett*, xxxiii. 201.

3. The mother of defendants was occupying plaintiff's house, at an agreed annual rent, which defendants, by parol, agreed to pay, so long as she should occupy it:—*Held*, that it was collateral and void. *Moses v. Norton*, xxxvi. 113.

4. The promise to answer for the debt or default of another must be in writing; but when a person originally undertakes to pay for services performed for, or goods furnished to, another, the promise need not be in writing. *Sanborn v. Merrill*, xli. 467.

5. A. sold to B. certain goods, for which B. promised to pay a bill due from A. to C. Afterwards C. presented his bill to B., who said it was good, that he had agreed with A. to pay it, and that he would pay it soon:—*Held*, that the promise was not within the statute of frauds. *Maxwell v. Haynes*, xli. 559.

See ASSUMPSIT, 4.

## II. FOR THE SALE OF LANDS, &c.

6. A contract, divesting a mortgagee of land, of the right of possession, before breach of condition, must be in writing. *Norton v. Webb*, xxxv. 218.

7. It is sufficient, however, if it be expressed in the mortgage, that the mortgager should maintain the mortgagee at a house upon the land. *Norton v. Webb*, xxxv. 218.

8. No permanent interest in real estate can be acquired by parol agreement. *Pitman v. Poor*, xxxviii. 237.

9. The right to abut and erect a dam upon the land of another for a permanent purpose must be granted by writing. *Moulton v. Faught*, xli. 298.

## III. FOR THE SALE OF GOODS, &c.

9. A contract to furnish an article to be manufactured or prepared in a prescribed manner is not affected by the statute of frauds. *Abbott v. Gilchrist*, xxxviii. 260.

10. Such as an agreement, to procure and deliver at a time and place fixed a vessel frame, to be hewn and prepared according to certain moulds. *Abbott v. Gilchrist*, xxxviii. 260.

11. Defendant verbally agreed for a cargo of coal of a certain kind, at a fixed price per ton, the plaintiffs to procure a vessel for its transportation. But the coal was not received on account of the vessel's having been wrecked:—*Held*, in a suit for the price, that, under the statute of frauds, there must be an acceptance as well as a delivery. *Maxwell v. Brown*, xxxix. 98.

12. A. agreed to pay B. a given sum for a quantity of bank bills, which were in the hands of C., subject to the order of D.—B. procured and delivered to A. the order of D. on C. for the bills, and A. received the order, but never presented it, nor received the bills:—*Held*, that the transaction was only a contract for sale, and, not having been in writing, was void. *Gooch v. Holmes*, xli. 523.

13. A contract for the delivery, and not for the manufacture and delivery, of blocks which may have been manufactured at the time, is within the statute of frauds. *Fickett v. Swift*, xli. 65.

## IV. UPON AN AGREEMENT, NOT TO BE PERFORMED WITHIN A YEAR.

14. A contract to employ a laborer for three years, at specified wages per day, is within the statute of frauds, unless the contract be in writing. *Tuttle v. Swett*, xxxi. 555.

See ARBITRATION, 34.

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## FUNDS FOR PIOUS AND CHARITABLE PURPOSES.

See WILL.

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## GEORGES CANAL COMPANY.

1. Chapter 564, Special Laws of 1839, provides, “that the property and affairs of” the Georges Canal Company “shall be managed by a board of directors,” and the “treasurer is authorized to receive the assessments due from stockholders.” *Brown v. Weymouth*, xxxvi. 414.

2. The treasurer has no authority to pay the debts of the company without the order of the directors, or to set-off the debts due from, by those due to, the company. *Brown v. Weymouth*, xxxvi. 414.

3. A note given by a debtor to a creditor of the company, by an agreement with the treasurer to cancel the indebtedment of the one by the credit of the other, (the act having been done without the authority or ratification of the directors,) is without legal consideration. *Brown v. Weymouth*, xxxvi. 414.

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## GIFT.

See DONATIO INTER VIVOS.

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## GOVERNOR AND COUNCIL.

1. The duty of opening and comparing votes for certain officers is imposed by law upon the Governor and Council, *eo nomine*. *Dennett, pet'r*, xxxii. 508.

2. The performance of a duty, so imposed, is not an act of the individuals who may hold the offices of Governor and Council, but is an official act of the Executive department. *Dennett, pet'r*, xxxii. 508.

3. Nor is such performance any the less an official act of that department, though the Legislature might have devolved it upon any other class of persons, instead of the Governor and Council. *Dennett, pet'r*, xxxii. 508.

4. For a correct performance of such official acts, the Governor and Council are not responsible to the judicial department; and the latter has no authority, by mandamus, to control the official doings of the former. *Dennett, pet'r*, xxxii. 508.

5. The Executive has no power to give a practical interpretation to laws, in conflict with legal opinions properly given by the Judiciary. *Davis, ex parte*, xli. 38.

### GRAND JURY.

1. Grand jurors are drawn, summoned and returned by the mandate of the statute, and not by order of the Court. *State v. Symonds*, xxxvi. 128.

2. In case of the deficiency in the number of grand jurors, the Court has no such authority, as in case of traverse jurors, to cause them to be returned *de talibus circumstantibus*, or in any other manner. *State v. Symonds*, xxxvi. 128.

3. And persons added to the grand jury, by virtue of a *venire facias*, issued by order of Court, in term time, are not legally members of such jury. *State v. Symonds*, xxxvi. 128.

4. Persons selected as grand jurors, by writs of *venire facias*, without seal, have no authority to act in that capacity, although empaneled and sworn in Court without objection. *State v. Lightbody*, xxxviii. 200.

### GRANTS.

1. Where the proprietors of the Kennebec Purchase, in their grants, bounded their grantees at high water, their subsequent *vote* to extend such grants to low water, did not enlarge their original grant. *Clancey v. Houdlette*, xxxix. 451.

2. The grant of James I., of England, of all the territory of New England, to the Council of Plymouth, also included all the soils, grounds, creeks, seas, rivers, islands, waters, and all and singular the commodities and jurisdictions, both within the said tract of land lying upon the main, as also within the said islands and seas adjoining. *Clancey v. Houdlette*, xxxix. 451.

3. No surrender of the subject of that grant, or any part thereof, was afterwards made to the sovereign authority. *Clancey v. Houdlette*, xxxix. 451.

## GRANTS BY THE SOVEREIGN POWER.

1. The title to lands granted by the sovereign power, upon a condition to be subsequently performed within a limited time, will remain valid, until such grantor, by Legislative Act, shall avail itself of a forfeiture. *Little v. Watson*, xxxii. 214.

2. The time for performing such condition, prescribed in a grant made by Massachusetts, prior to the separation of that State from Maine, of lands in this State, may yet be extended by the Legislature of that Commonwealth, notwithstanding the separation. *Little v. Watson*, xxxii. 214.

3. The State, by virtue of its sovereignty or right of eminent domain, may abridge, control or destroy a public easement in a stream within its limits; but, until it does so by positive legislation, all persons may lawfully enjoy such easement in common with the State. *Aliter*, in regard to public lands. *Treat v. Lord*, xlii. 552.

4. A conveyance by the State of all its right, title and interest, in and to the lands over which a navigable stream flows, does not authorize the grantee, or those claiming under him, to use exclusively or to destroy the public easement in said stream. *Treat v. Lord*, xlii. 552.

See LANDS RESERVED, &c.

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 GUARANTY.

1. An agreement, containing a guaranty that there is a certain quantity of timber upon a tract of land, does not necessarily authorize the inference that the grantor knew the fact to be, as the guaranty stipulates, that it shall be for the foundation upon which business is to be transacted. *Hammatt v. Emerson*, xxvii. 308.

2. Where one transfers a note, and, at the same time, guarantees its payment, the consideration of the transfer is sufficient consideration for the guaranty. *Gillighan v. Boardman*, xxix. 79.

3. A guaranty to pay a note after the grantee has obtained execution, if it cannot be collected of the maker, is valid, although the execution be obtained in the name of an indorsee of the guarantee. *Gillighan v. Boardman*, xxix. 79.

4. In such case, the grantor would not be discharged by want of notice, (before suit against him,) that the note could not be collected of the maker, or by any other laches of the guarantee, unless such want of notice or such laches, in case of his liability, would be the occasion to him of some loss or injury. *Gillighan v. Boardman*, xxix. 79.

5. Where one owed the plaintiff upon a written contract, and a guaranty, that he should perform, was indorsed on it by the defendant, the law presumes the plaintiff to have been the party to whom the guaranty was made, though not named in it. *Jenness v. True*, xxx. 438.

6. One who purchases an unindorsed negotiable note, and afterwards writes his name with the word "holden" upon the back of it, and sells it for value,

may be holden as guarantor to whomsoever he sells the note; but to no other person. *Irish v. Cutter*, xxxi. 536.

See *BILLS*, &c., 9.

## GUARDIAN AND WARD.

1. If a guardian, in the settlement of his account, omit to charge himself with what he was required by law to account for, that settlement will not protect him from liability in his next settlement. *Starrett v. Jameson*, xxix. 504.

2. A guardian is accountable for interest moneys due on notes to his ward, whether he collect such moneys, or whether they be lost by his neglect. *Starrett v. Jameson*, xxix. 504.

3. A guardian is not entitled to any compensation for services, if he neglect to settle a guardianship account once in every three years, unless prevented by sickness or unavoidable accident, although he was never cited to make such settlement. *Starrett v. Jameson*, xxix. 504.

4. Of a child, having no father or mother, the guardian is entitled to the custody, as against a relative, to whom its father, a few days before his death, and in view of that event, had made a verbal gift of the child, "to take care of, have and keep, as his own child." *Coltman v. Hall*, xxxi. 196.

5. A guardianship account may be settled by the Judge of Probate, after the minority of the ward has expired. *Pierce v. Irish*, xxxi. 254.

6. In a guardianship account, the guardian's negotiable note, given to the ward for a specified sum, is viewed, not as a decree that such sum is money still due to the ward, in the hands of the guardian, but as payment to the ward. *Pierce v. Irish*, xxxi. 254.

7. Such a charge may be allowed when the Judge of Probate is satisfied it was the intention of the ward to receive the note as payment. *Pierce v. Irish*, xxxi. 254.

8. Where a ward, after having arrived at full age, has examined the guardianship account, and certified thereon its correctness, and his assent to its allowance, the Judge of Probate may allow the account without notice to the ward. *Pierce v. Irish*, xxxi. 254.

9. A neglect, for three years, to settle a guardianship account, (except in certain cases,) is a breach of the bond. But if the ward examine the final account, and discharge the balance, by taking a negotiable note for its amount, and the account be accordingly settled in the Probate Court, the damages for the breach of the bond will be considered as included in the settlement, or waived. *Pierce v. Irish*, xxxi. 254.

10. A guardianship, for the cause of insanity, cannot be established over the husband, upon the application of his wife. *Howard, pet'r*, xxxi. 552.

11. The statute has not fixed the highest rate of compensation for the services of a guardian; and it may be much beyond the amount of commissions. *Emerson, appellant*, xxxii. 159.

12. The appointment of a guardian *ad litem* is at the discretion of the Court. *King v. Robinson*, xxxiii. 114.

13. The plaintiff is not bound to ascertain the mental capacity of a defendant and bring it before the Court, in order that a guardian *ad litem* may be appointed. *King v. Robinson*, xxxiii. 114.

14. A defendant, who becomes *non compos mentis*, if of full age, must appear by attorney and not by guardian. *King v. Robinson*, xxxiii. 114.

15. The appointment of an administrator to be guardian of minor children interested in the estate is merely void. *Sawyer v. Knowles*, xxxiii. 208.

16. Nor would such an appointment furnish any legal inference that he had been previously discharged from the administratorship. *Sawyer v. Knowles*, xxxiii. 208.

17. Proof, that one has been legally appointed to an office or place, furnishes a presumption that he continues to hold it during the term prescribed by law, or until he has been legally discharged. *Sawyer v. Knowles*, xxxiii. 208.

18. The first three years, within which a guardian is bound to settle a guardianship account, do not commence until assets shall have come into his hands. *Hudson v. Martin*, xxxiv. 339.

19. In settling a guardianship account with a minor, in the Probate Court, no previous notice is requisite, except in cases where new guardians may have been appointed. *Hudson v. Martin*, xxxiv. 339.

20. The expenses for the education of a minor, who has a father living, must be paid out of such father's property, when they are not greater than the father can afford, regard being had to the situation of the father's family, and to all the circumstances of the case. *Hudson v. Martin*, xxxiv. 339.

21. No fees for travel and attendance at Probate Court can be allowed in the settlement of a guardianship account, except for such as were actually performed and necessary. *Hudson v. Martin*, xxxiv. 339.

22. Where the guardian had made specific charges for all his services, his commissions were reduced to two and one-half per cent. upon the moneys in his hands. *Hudson v. Martin*, xxxiv. 339.

23. The property in a judgment recovered by a guardian, in the name of the ward, rests in the ward; and the guardian has no lien thereon for advances made in its recovery. *Lang v. Whitney*, xxxvi. 155.

24. Nor can he maintain any action, after the death of his ward, against an officer, for the money collected on such judgment. *Lang v. Whitney*, xxxvi. 155.

25. A creditor of a person under guardianship can maintain no action against the guardian. But a refusal to pay the just debts of his ward will constitute a breach of the guardian's bond, and the creditor may resort to a suit upon it for indemnity. *Raymond v. Sawyer*, xxxvii. 406.

26. A sale of real estate by a guardian, under a license of the Probate Court, without having given the bond for such sale, will vest no title in the grantee; and the consideration money may be recovered back upon the covenants of the deed, or for money had and received. *Williams v. Morton*, xxxviii. 47.

27. The bond given by a guardian on his appointment, for the faithful performance of his duties, is no security for the sale and avails of real estate sold under license; nor will the omission to give a bond under such license constitute a breach of his general bond. *Williams v. Morton*, xxxviii. 47.



28. Neither could such a conveyance be considered a release under R. S. of 1841, c. 81, § 7, which relates to corporations *taking* any real estate, &c. *Williams v. Morton*, XXXVIII. 47.

29. No person can legally claim to be appointed as the guardian of another; but, with the exceptions of certain legal disqualifications, the appointment is left to the discretion of the Judge of Probate. *Lunt v. Aubens*, XXXIX. 392.

30. But the statute authorizes an appeal from his decree by any one aggrieved. The next of kin, or heir presumptive of the ward, may be aggrieved within the purview of the statute, and can appeal. *Lunt v. Aubens*, XXXIX. 392.

31. Whether an appointment of guardian was of a suitable person for the trust, is a fact to be determined by the presiding Judge in the appellate Court, upon the evidence before him, and cannot be re-examined in a Court of law. *Lunt v. Aubens*, XXXIX. 392.

32. Dower may be assigned by a guardian. *Curtis v. Hobart*, XLI. 230.

## HABEAS CORPUS.

1. To justify the discharge, upon *Habeas Corpus*, of a respondent, imprisoned by a justice's mittimus, to enforce the payment of a fine for unlawfully selling spirituous liquors, it is not sufficient that the mittimus fails to state the name of the purchaser, or the quantity sold, or the time and place of sale, or that there was a prosecutor; *provided*, the mittimus shows the offence to be one for which the justice has jurisdiction to impose a fine. *Phinney, pet'r*, XXXII. 440.

2. Neither, to justify such discharge, is it sufficient that the justice erroneously ordered the fine to be paid to the State. *Phinney, pet'r*, XXXII. 440.

3. Where the penalty, for illegally selling spirituous liquors, is recovered by an action of debt, before a justice of the peace, the judgment is to be enforced by execution and not by mittimus; and a person, imprisoned by virtue of a mittimus in such case, may be discharged by writ of *Habeas Corpus*. *Hanson, pet'r*, XXXVI. 425.

## HANDWRITING.

See EVIDENCE, 243, 244.

## HAY.

1. R. S. of 1841, c. 64, by necessary inference, prohibits the sale or purchase of hay, unless branded as is prescribed in the first section. *Buxton v. Hamblen*, XXXII. 448.

2. A contract to purchase hay, in violation of that law, cannot be enforced. *Buxton v. Hamblen*, xxxii. 448.

3. A contract for the sale and purchase of pressed hay, to be performed at a future day, upon which the delivery was to be made, cannot be enforced by the seller, if, at the time of delivery, it was not duly branded. *Buxton v. Hamblen*, xxxii. 448.

## HEALTH OFFICERS.

See QUARANTINE.

## HEIRS.

1. Land was conveyed in trust, to the use of G., one of the grantor's sons, for his life, and then to descend and vest in the heirs of the grantor. G. died subsequently to the death of the grantor, leaving one child: — *Held*, that, if it was at the death of the grantor, that the remainder, subject to the life estate, became vested in his heirs, G. being one of them, might convey his vested remainder, leaving to his child no inheritance in the land, — also, that, if the remainder was contingent until the death of G., and then vested in the heirs of the grantor, G., not being then in life, could not inherit, and his child could take nothing in the land. *North v. Philbrook*, xxxiv. 532.

2. By R. S. of 1841, c. 93, § 3, every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall, in all cases, be considered as heir of his mother, and shall inherit his or her estate; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral; unless, before his death, his parents shall have intermarried and had other children, and his father, after such marriage, shall have acknowledged him as aforesaid, or adopted him into his family. *Hunt v. Hunt*, xxxvii. 333.

2. On a petition for partition of the father's estate, *it was held*, that the facts essential to be proved to allow an illegitimate child to inherit his father's estate, under this statute, were entirely distinct from such as would authorize him to inherit, by representation of his father or mother, from his lineal and collateral kindred; and, —

1st. That no illegitimate child could inherit the estate of his father as heir, unless the written acknowledgment required by this statute had been properly executed. Per SHEPLEY, C. J., and TENNEY and HOWARD, J. J. — APPLETON, J., dissenting.

2d. But that such child might inherit, by representation of his father or mother, from his lineal and collateral kindred, without such acknowledgment, if the parents had intermarried and had other children, and the father, after such marriage, had adopted the child into his family. *Hunt v. Hunt*, xxxvii. 333.

3. The rights to an estate, vested before the Act of 1852, c. 266, must be determined by a legal and judicial, not legislative, construction of the laws in force at the time; and said Act cannot alter them. *Hunt v. Hunt*, XXXVII. 333.

4. Where a husband effects an insurance on his life "for the sole and separate use and benefit of his wife," if she dies before her husband, the property in the contract of insurance vests in her heirs; and the children of a former wife can take no portion of such insurance by inheritance, while any issue of the second wife survives. *Libby v. Libby*, XXXVII. 359.

5. But, if the wife and her children die before the assured, the beneficial interest is in him, and his administrator can receive the insurance. And the children of a former wife, by the Act of 1844, c. 114, will inherit the insurance, less the amount of the premium and interest thereon, without being subject to administration. *Libby v. Libby*, XXXVII. 359.

6. The estate of an intestate must be distributed according to the laws in force at the time of the death. *Hughes v. Decker*, XXXVIII. 153.

7. If, after the death of the intestate, and before the sum to be distributed is collected, the law as to distribution is changed, such change cannot affect the rights of the distributees at the time of the death. *Hughes v. Decker*, XXXVIII. 153.

8. The mother of an illegitimate child is not kindred with her child, under § 19, of c. 38, of stat. 1821. *Hughes v. Decker*, XXXVIII. 153.

9. The division of an estate in Probate Court, in which a parcel is set out to an heir long before dead, is invalid. *Wass v. Bucknam*, XXXVIII. 356.

10. If the owner of land executes a lease of it, for a series of years, and die, the accruing rents, after his death, descend to his heirs. *Stinson v. Stinson*, XXXVIII. 593.

11. An heir apparent, who released all his present and future claim and interest in his father's estate, with a covenant, that neither he, nor any one claiming by him, shall ever claim any right to the same, which release was made with the knowledge and consent of his father, is precluded from afterwards setting up title to any part of the estate, either as heir or devisee. *Curtis v. Curtis*, XL. 24.

12. Lands held in trust, unless generally or specifically devised by the testator, descend to his heirs, and they only can release it. *Richardson v. Woodbury*, XLIII. 206.

13. Where one, by inheritance, may be entitled to a portion of an estate, but had been hopelessly insane for twenty years, and the other heirs covenant that they are solely entitled to represent said part, and that they will warrant and defend the same against all persons claiming under their ancestor, the grantees are entitled to hold the whole estate against all who do not claim under the insane heir. *Loomis v. Pingree*, XLIII. 299.

## HUSBAND AND WIFE.

- I. RIGHTS AND LIABILITIES OF THE HUSBAND.
- II. RIGHTS AND LIABILITIES OF THE WIFE.
- III. THEIR RESPECTIVE RIGHTS IN HER PROPERTY.
- IV. ACTIONS BY AND AGAINST HUSBAND AND WIFE.

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 I. RIGHTS AND LIABILITIES OF THE HUSBAND.

1. For articles furnished a married woman residing with her husband, necessary and proper for her, though charged to her, the husband is liable. *Furlong v. Hysom*, xxxv. 332.

2. Cohabitation, of itself, furnishes a presumption of the husband's assent to contracts made by the wife for necessities, suitable to his degree and estate; and the jury may infer authority. *Furlong v. Hysom*, xxxv. 332.

3. Under the Act of 1847, c. 27, the husband may lawfully transfer a promissory note to his wife, although the maker is his creditor; and inadequacy of consideration is not sufficient to defeat such transfer. There must be also an intent to defraud existing creditors. *Motley v. Sawyer*, xxxviii. 68.

4. But inadequacy of consideration may be submitted to the jury, for the sole purpose of ascertaining the intent of the parties. *Motley v. Sawyer*, xxxviii. 68.

5. No action can be maintained against the husband for purchases of personal estate, made by his wife, in carrying on business on her own account, although made with his knowledge and consent. *Colby v. Lamson*, xxxix. 119.

6. And although she appropriated a portion of the proceeds of such purchases for the benefit of her husband and family. *Colby v. Lamson*, xxxix. 119. *Oxnard v. Swanton*, xxxix. 125.

7. But, where the husband knowingly participated in the profits of the sale, and that she professed to act for him, a jury may infer from such facts, that the purchases were made upon his credit. *Oxnard v. Swanton*, xxxix. 125.

8. The wife of A., in his absence and by his authority, having accepted a draft for him in her own name, the rights of the parties are to be determined by the rules of common law, which are not affected in their application to this case by the statutes of this State. Such indorsement, therefore, will bind the husband. *Hancock Bank v. Joy*, xli. 568.

9. The wife of A., in default of payment of fine and costs, duly imposed upon conviction of a statute offence, was committed to prison. Under R. S. of 1841, c. 175, she gave her negotiable promissory note, payable to County Treasurer, &c., for the amount of the fine and costs, and for her board while in prison. In an action by the indorsee of said note against the husband:—*Held*, that he was not liable. *Bates v. Enright*, xlii. 105.

See MARRIED WOMAN.

## II. RIGHTS AND LIABILITIES OF THE WIFE.

10. The Act of 1844, c. 117, has not so altered the common law, as to enable a *feme covert* to sell her personal property, without the assent of her husband. *Swift v. Luce*, xxvii. 285.

11. Neither at law or equity, can the widow maintain process against an authorized agent, for moneys received for lands belonging to her and sold during coverture. *Crosby v. Otis*, xxxii. 256.

12. A bond, given to husband and wife for their maintenance during each of their lives, belongs to the wife, if she survive the husband, unless reduced to possession by him; to do which, he must do some act indicating an appropriation of it, or disaffirming her right. *Pike v. Collins*, xxxiii. 38.

13. Under the recent statutes, the property in a negotiable note may pass from the husband to the wife, during coverture, by his indorsement and delivery. And, after dissolution of the marriage, such indorsee may maintain suit upon it in her name. *Motley v. Sawyer*, xxxiv. 540.

14. The wife, as such, has no authority to put her husband's name to a contract. *Shaw v. Emery*, xxxviii. 484.

15. But where a promissory note, against the defendant, was canceled and given up to his wife, for which she gave another similar note, changing the word "order" to "bearer," and signed the defendant's name thereto, which he subsequently ratified; such note is sufficient to establish a *prima facie* case, in an action by the party lawfully holding it. *Shaw v. Emery*, xxxviii. 484.

16. A wife cannot maintain an action against her husband; and, if, in such action, he fails properly to plead the coverture in bar, and the case is determined in his favor, he is not entitled to costs. *Smith v. Gorman*, xli. 405.

17. A gold watch, given by a debtor to his wife before marriage, in 1844, and while they were residing in the State of New York, and still in her possession, is liable to attachment here for the debts of her husband. *Tllexan v. Wilson*, xliii. 186.

18. But property, conveyed to the wife by her father, since 1844, and while residing in this State, is not thus liable. *Tllexan v. Wilson*, xliii. 186.

See MARRIED WOMAN.

## III. THEIR RESPECTIVE RIGHTS IN HER PROPERTY.

19. The Act of 1844, c. 117, is prospective merely. The interest which the husband acquired in the real estate of the wife, by a marriage prior to that Act, is not affected by it. *McLellan v. Nelson*, xxvii. 129. *Greenleaf v. Hill*, xxxi. 562.

20. A husband, by his marriage, becomes entitled to a freehold estate in the lands then owned by the wife, and that estate he can lawfully convey. *Trask v. Patterson*, xxix. 499. *Eldridge v. Preble*, xxxiv. 148.

21. By the common law, a note made payable to a married woman, instantly belongs to her husband. *Greenleaf v. Hill*, xxxi. 562. *Hancock Bank v. Joy*, xli. 568.

22. When lands, belonging to the wife, have been sold by an authorized agent, the money received therefor, in the hands of the agent, belongs to the husband, and, after his death, may be received by his administrator. *Crosby v. Otis*, xxxii. 256.

23. Under the Act of 1844, c. 117, the life estate of the husband in the lands of his wife, was divested from him, in behalf of his wife, only upon condition that she proved the title not to have come to her from their after coverture. *Eldridge v. Preble*, xxxiv. 148.

24. The amendatory Act of 1847, and the additional Act of 1848, were prospective only. *Eldridge v. Preble*, xxxiv. 148.

25. The common law principle, that the income from the labor of the wife enures to the benefit of the husband, has not been impaired by the laws of this State. *Bradbury v. Andrews*, xxxvii. 199. *Merrill v. Smith*, xxxvii. 394.

26. To become the owner by "purchase," under Act of 1847, c. 27, the wife must make it from her own property, or that of others, by their consent, for her use. *Merrill v. Smith*, xxxvii. 394.

27. But a "purchase," made on the credit, or from the means of the husband, or from the avails of her labor, belongs to the husband. *Merrill v. Smith*, xxxvii. 394.

28. A seizin by a married woman in her own right, without seizin in fact, will entitle her husband at her death to become tenant by curtesy. *Wass v. Bucknam*, xxxviii. 356.

29. The indorsement of a note, made payable to a married woman, transfers no property in it, at common law. *Hancock Bank v. Joy*, xli. 568.

See MARRIED WOMAN.

#### IV. ACTIONS BY, AND AGAINST, HUSBAND AND WIFE.

30. In an action against husband and wife, for goods sold to her before marriage, where she, while sole, on petition, had been duly declared a bankrupt under U. S. Bankrupt Act of 1841, and had presented a petition for her discharge, and then intermarried with the defendant; and, subsequently to the marriage, a certificate of discharge, under a decree of the Court, was issued to her in her maiden name:—*Held*, that such certificate was available to her and her husband in such suit. *Chadwick v. Starrett*, xxvii. 138.

31. A suit by husband and wife, to recover land which she had deeded when an infant, is a disaffirmance of her act of sale. *Chadbourn v. Rackliff*, xxx. 354.

32. In a suit by husband and wife, the defendant, under the general issue, cannot prove that she was lawfully married to a former husband, who was living at the time of her second marriage. *Benner v. Fowles*, xxxi. 305.

33. *It seems*, that a marriage *de facto*, whether legal or not, is sufficient for the maintenance of such an action. *Benner v. Fowles*, xxxi. 305.

34. The recovery of an action in the name of both, upon a bond, given for their maintenance, without taking out execution, shows a disposition not to appropriate such bond to the husband. *Pike v. Collins*, xxxiii. 38.

35. The statutes, enlarging the rights of married women, as to property, do not extend to rights of action for tort. *Ballard v. Russell*, xxxiii. 196.

36. To recover for an injury sustained by a married woman through malpractice of a surgeon, the husband must be a party to the suit, although he may have previously deserted her. *Ballard v. Russell*, xxxiii. 196.

37. And a discharge of the cause of such action will bar any suit upon it. *Ballard v. Russell*, xxxiii. 196.

38. Neither, by the common law, nor by any statute, can an action on a contract be maintained against husband and wife jointly. *Davis v. Millett*, xxxiv. 429.

39. Neither can the wife become a party to a contract of purchase, solely, or jointly with her husband, by the common law or statute law. *Davis v. Millett*, xxxiv. 429.

40. For an injury done to the wife through a defect in the highway, the husband and wife must join in an action. *Sanford v. Augusta*, xxxiv. 536. *Starbird v. Frankfort*, xxxv. 89.

41. Where the lessee of real estate which is manifestly beneficial, is a married woman, one, entitled to dower in the premises, may enforce it against both husband and wife. *Libbey v. Staples*, xxxix. 166.

See COSTS, 19.

MARRIED WOMAN.

MORTGAGE, 7.

## IDENTITY.

The certificate of two justices of the peace, discharging a poor debtor from arrest on execution, erroneously stated the date of the judgment; but in every other particular conformed to the facts:—*Held*, that the record evidence preponderated in favor of the identity of the judgment. *Hathaway v. Stone*, xxxiii. 500. *Warren v. Davis*, xlii. 343.

See EVIDENCE, 280—291.

## ILLEGITIMATE CHILDREN.

See HEIRS, 2, 8. PAUPER, 6.

## IMPEACHMENT.

See JUDGMENT. MILLS, &c.

## IMPOUNDING.

1. The certificate, left with the pound-keeper, should state the town in which the impounder resided, and his name, the owner of the inclosure, and the town in which it is located; or it will not be a justification. *Morse v. Reed*, xxviii. 481.

2. And the advertisements should state the "time and cause of impounding;" the date of the advertisement not being sufficient. *Morse v. Reed*, xxviii. 481.

3. By the R. S. of 1841, sheep, found doing damage upon the land of any person, may be impounded, as a remedy to recover such damage, unless, being rightfully upon the adjoining land, they escaped therefrom through a defect in that distinct part of the division fence, which he, suffering the damage, was bound, by prescription or otherwise, to maintain. *Webber v. Closson*, xxxv. 26.

4. In a penal action upon R. S. of 1841, c. 30, an allegation that the act complained of was contrary to an Act of the State, entitled, "of pounds and impounding beasts," is equivalent to an allegation that it was *contra formam statuti*. *Cleaves v. Jordan*, xxxv. 429.

5. Sect. 4 of c. 17, of the Act of 1853, provides that each city or town shall be responsible in damages to the party injured, for all illegal doings or defaults of its pound-keeper; notwithstanding which, the pound-keeper is also liable. *Rounds v. Mansfield*, xxxviii. 586.

6. In a suit against him, he cannot justify as pound-keeper, without showing that his bond was approved before the acts complained of were done. *Rounds v. Mansfield*, xxxviii. 586.

See BOND, 10.

## INDIANS.

The power given to Congress to regulate commerce with the Indian tribes, does not include navigation with the Penobscot Indians, or, *as it seems*, with any of the Indian tribes whatever. *Moor v. Veazie*, xxxii. 343.

## INDICTMENT.

- I. WHAT IS INDICTABLE.
- II. PLEADING.
- III. PRACTICE AND EVIDENCE.

### I. WHAT IS INDICTABLE.

1. Since the enactment of R. S. of 1841, c. 25, § 57, the obligation of towns to keep in repair their highways and bridges, has been absolute and unqualified; and, for neglect of that duty, they are liable to indictment. *State v. Gorham*, xxxvii. 451.

2. And all such bridges and abutments as are constructed by railroad companies, to enable their road to pass over or under any turnpike, road, &c., are parts of the highway which the town is bound to maintain, and for the neglect of which they are indictable. *State v. Gorham*, xxxvii. 451.



## II. PLEADING.

- (a) FINDING OF THE INDICTMENT.
- (b) CAPTION.
- (c) CONCLUSION.
- (d) PARTIES.
- (e) AVERRING A NEGATIVE.
- (f) TIME AND PLACE.
- (g) SURPLUSAGE AND CERTAINTY.
- (h) DUPLICITY AND REPUGNANCY.
- (i) OTHER POINTS.
- (j) UNDER STATUTES.

(a) *Finding of the indictment.*

3. An indictment cannot lawfully be found in the District Court for an offence, which can be tried in this Court only, unless the accused had been previously committed or bound over to the District Court upon recognizance. *State v. Jackson*, xxxii. 40.

4. Where such an indictment had been found against two jointly, one of whom had neither been committed nor recognized, while the other had been bound over:—*Held*, that the indictment was irregular as to the former, but that that circumstance did not impair its validity as to the latter. *State v. Jackson*, xxxii. 40.

5. Such an indictment is not invalidated, merely because the recognizance, which preceded it, did not specify the offence, charged in the indictment. *State v. Jackson*, xxxii. 40.

6. An indictment found by twelve persons acting as grand jurors, some of whom were added to the panel by virtue of a *venire*, issued by order of the Court in term time, is void. *State v. Symonds*, xxxvi. 128.

7. Such an objection, made on motion in writing, in the nature of a plea in abatement, is fatal, though not taken till the arraignment. *State v. Symonds*, xxxvi. 128.

8. An indictment, found by persons selected as grand jurors, under writs of *venire facias*, without seal, may be quashed on motion. *State v. Lightbody*, xxxviii. 200.

9. An indictment is properly certified by the foreman of the grand jury, although it bear only the initials of his christian name. *State v. Taggart*, xxxviii. 298.

(b) *Caption.*

10. An indictment, commencing "State of Maine, Cumberland, ss. At the Supreme Judicial Court, begun and holden at Portland, within and for the County of Cumberland," is sufficient to show that the Court, at which it was found, was holden for that county in the State of Maine. *State v. Conley*, xxxix. 78.

(c) *Conclusion.*

11. An indictment for keeping a house of ill fame, being a statute offence, need not conclude that the act was to the common nuisance of the public. *State v. Stevens*, xl. 559.

(d) *Parties.*

12. If an indictment against a *feme covert* describes her as "matron," the error, if it be one, is not sufficient cause for quashing the indictment or arresting the judgment. *State v. Nelson*, xxix. 329.

13. The forfeiture, incurred by a town for a defect in its highways, whereby a loss of life occurred, may be recovered by the administrator or executor by indictment. *State v. Bangor*, xxx. 341.

(e) *Averring a negative.*

14. In an indictment against a *feme covert*, for receiving stolen goods, it is unnecessary to allege that the offence was not committed by the coercion of the husband. *State v. Nelson*, xxix. 329.

15. Allegations in an indictment, suited only to negative an anticipated defence, need not be proved. *State v. Bangor*, xxx. 341.

16. The exceptions in the enacting clause of a penal statute are to be negatived in the indictment. *State v. Keen*, xxxiv. 500. *State v. Gurney*, xxxvii. 149. *Hinckley v. Penobscot*, xlii. 89.

17. Any words excluding the exceptions of the statute with certainty are sufficient. *State v. Keen*, xxxiv. 500.

17. Under the Act of 1851, an indictment, charging that the accused was a common seller of intoxicating liquors, "without any lawful authority, license or permission," is sufficient. *State v. Keen*, xxxiv. 500.

18. It is not necessary that the indictment should negative any clause subsequent to the enacting clause. They are to be pleaded and proved by the defendant. *State v. Gurney*, xxxvii. 149. *Hinckley v. Penobscot*, xlii. 89.

19. Thus, in an indictment charging that the defendant is a common seller of prohibited liquors, it is not necessary to aver that they were not imported from any foreign place or sold by him in the importation packages. *State v. Gurney*, xxxvii. 149.

See INDICTMENT, 60.

(f) *Time and place.*

20. In an indictment, every material fact necessary to constitute the offence charged must be set forth with certainty as to the time. *State v. Thurston*, xxxv. 205.

21. An indictment, found in October, 1852, charging that the defendant on the 25th March, 1851, committed adultery with E. W., the wife of S. H. W., she being a married woman and the lawful wife of S. H. W., does not sufficiently allege that she was a married woman when the alleged offence was committed. *State v. Thurston*, xxxv. 205. *State v. Hutchinson*, xxxvi. 261.

22. But an allegation that the defendant, on the 1st of Nov., 1852, and on divers other days and times, &c., did commit the crime of adultery with L. H., the wife of one M. H., he, the said defendant, being then and there a married man, &c., sufficiently declares the defendant to have been married to some other person than L. H., at the time of the alleged offence. *State v. Hutchinson*, xxxvi. 261.

23. In an indictment for murder, the time of the mortal stroke and death should be alleged; but the old form "did suffer and languish, and languishing did live," may be omitted, *State v. Conley*, xxxix. 78.

24. An indictment, in which two distinct times and places have been mentioned, in, and at, which the substantive offence has been committed, and reference thereto is afterwards made by the words "then and there," is defective; but when one of the places previously mentioned is merely *descriptio personae*, it is unexceptionable. *State v. Jackson*, xxxix. 291.

25. In an indictment for keeping a house of ill fame, it is unnecessary to describe the street where it is situated. *State v. Stevens*, xl. 559.

(g) *Surplusage and certainty.*

26. In a charge for a conspiracy, if the act to be done is in itself illegal, the indictment need not set forth the means by which it was to be accomplished. *State v. Bartlett*, xxx. 132. *State v. Ripley*, xxxi. 386.

27. If the act to be done is not in itself unlawful, but becomes so from the purposes for which, and the means by which, it is to be done, the indictment must set out enough to show the illegality. *State v. Bartlett*, xxx. 132. *State v. Ripley*, xxxi. 386.

28. In conspiracy, acts need not be set forth or proved, except as evidence of the combination. *State v. Ripley*, xxxi. 386.

29. In conspiracy, if the means, by which the alleged purpose was to be accomplished, be not set out, the purpose itself should appear to have been unequivocally illegal and forbidden by law. *State v. Hewett*, xxxi. 396. *State v. Roberts*, xxxiv. 320.

30. It is not enough, that it sufficiently describe the crime attempted to be charged; it should also state the facts necessary to constitute it. *State v. Hewett*, xxxi. 396. *State v. Roberts*, xxxiv. 320.

31. An indictment against a town, cannot be maintained upon an allegation, that there is a highway extending into several towns, and that the "said road or that part of it in" the defendant town, is out of repair, &c. *State v. Milo*, xxxii. 55.

32. In an indictment, alleging that a pregnant female was murdered by the defendant, by his attempt to procure abortion, and that "she was quick with child," the latter clause may be rejected as surplusage. *State v. Smith*, xxxii. 369.

33. An indictment charged, that the defendant, in the exercise of his trade, collected and kept certain (specified) articles in a corrupted state, "and in manner aforesaid," collected and kept other (specified) offensive matters, and "that by reason of the premises," &c. : — *Held*, that the indictment sufficiently alleged, that it was in the exercise of the trade, that the last mentioned offensive matters were collected and kept; and that the term "premises" included both the exercise of the trade and the accumulation of the materials in that exercise, &c. *State v. Hart*, xxxiv. 36.

34. An indictment charging a conspiracy to defraud a person of his money, goods or estate; or to cheat and defraud him of his money, goods, or estate; or wrongfully and wickedly to obtain his money and other property designedly and with intent to defraud, without particularizing the object to be accomplished or the means to be used, is insufficient. *State v. Roberts* xxxiv. 320.

35. An allegation in such an indictment, that the purpose was to be accomplished by "false pretences," is not sufficiently descriptive of the means. *State v. Roberts*, xxxiv. 320.

36. In an indictment for murder by the infliction of wounds, their length, breadth and depth may be omitted, *if* it is alleged they were mortal. *State v. Conley*, xxxix. 78.

37. Where it is alleged, that the defendants, with a dangerous weapon, struck and beat, giving mortal wounds of which the person died, it is unnecessary to add the words "by the stroke or strokes aforesaid." *State v. Conley*, xxxix. 78.

38. An averment, that the liquors were sold "by retail and in less quantities than the revenue laws of the United States prescribe for the importation thereof into this country," may be regarded as surplusage. *State v. Robinson*, xxxix. 150.

(h) *Duplicity and repugnancy.*

39. More than one offence of the same nature may be embraced in one indictment. *State v. Nelson*, xxix. 329. *State v. Burke*, xxxviii. 574.

40. In an indictment for receiving stolen goods, where the goods of several persons are received at the same time, so that the transaction is the same, one count may embrace the whole. *State v. Nelson*, xxix. 329.

41. The buying, receiving and aiding in concealing stolen goods, under R. S. of 1841, c. 156, § 10, constitute but one offence, which may be committed in three different modes. *State v. Nelson*, xxix. 329.

42. An indictment under R. S. of 1841, c. 162, "of malicious mischief," &c., may be maintained, although the facts proved might have supported an indictment under c. 155, for arson. *Thayer v. Boyle*, xxx. 475.

43. An indictment for malicious mischief will not necessarily be defeated, merely because the acts proved might have supported a charge for larceny. *State v. Leavitt*, xxxii. 183.

44. In an indictment, a count sufficiently charging two distinct offences, is bad for duplicity. *State v. Palmer*, xxxv. 9.

45. But a count describing one offence with sufficient accuracy, is not rendered bad by the addition of averments insufficiently setting forth another offence. *State v. Palmer*, xxxv. 9.

46. An objection to an indictment for duplicity should be taken, *it seems*, by demurrer or on motion to quash. *State v. Palmer*, xxxv. 9.

47. An indictment does not contain two offences in one count which alleges a nuisance and describes the place of its existence. *State v. Payson*, xxxvii. 361.

48. One good count is sufficient to support a general verdict of guilty, however defective the others may be. *State v. Burke*, xxxviii. 574.

49. An indictment under § 2, c. 162 of R. S. of 1841, charging, that the act was done maliciously and wantonly, describes but one offence; and is supported by proof that the act was done maliciously or wantonly. *State v. Burgess*, xl. 592.

(i) *Other points.*

50. In an indictment, one count may refer to another, to save unnecessary repetition. *State v. Nelson*, xxix. 329.

51. *It seems*, an indictment is good at common law, which charges that the defendant did unlawfully keep and maintain, for his own lucre, a common and disorderly room, called a bowling alley, and did unlawfully procure and permit divers persons to frequent and come together at said alley for the purpose of bowling, and being so together, there to play at bowls in the day time and in the night time, to the great annoyance, damage and common nuisance of all the citizens of the State. *State v. Haines*, xxx. 65.

52. So is an indictment, which alleges that the defendant "with force and arms, near the dwellinghouses of divers citizens, and near divers streets and common highways, did unlawfully erect and continue and use a certain building as a place for bowling; and, being so there, to play at bowls in the day time, &c., thereby occasioning great noises, damage and other annoyances, and becoming injurious and dangerous to the comfort of divers individuals and the public, and to the common nuisance, &c. *State v. Haines*, xxx. 65.

53. An indictment must allege all the material facts, necessary to be proved to procure a conviction. *State v. Philbrick*, xxxi. 401.

54. An indictment for obtaining property by false pretences, is defective, unless it set forth the sale or exchange, and that the false pretences were made with a view to effect such a sale or exchange, and that, by reason thereof, the party was induced to part with his property. *State v. Philbrick*, xxxi. 401.

55. An indictment against a town, for not maintaining a bridge upon one of its highways, need not allege that the highway had been opened for travel; or that the time for opening it had expired; or that it was practicable or necessary to build the bridge; or that the safety and convenience of travelers required the bridge. *State v. Milo*, xxxii. 57.

56. An indictment, alleging the breaking into and stealing within "a building," (without stating that it was a building in which goods, merchandize or any valuable thing was kept for use, sale or deposit,) charges a simple larceny only. *State v. Savage*, xxxii. 583.

57. In an indictment under R. S. of 1841, c. 161, § 1, it is not necessary to allege that the property parted with by the defendant was of any value. *State v. Dorr*, xxxiii. 498.

58. An indictment for forgery or counterfeiting, or for having counterfeit bills in possession, should set forth the forged or counterfeit instruments by *fac simile*, or copy, whenever practicable. It must set forth the *tenor* of the instruments, and not their *purport* and *effect*. *State v. Bonney*, xxxiv. 383.

59. The crime of adultery is well laid, if one only of the parties is alleged to be married at the time of the commission of the offence. *State v. Hutchinson*, xxxvi. 261.

60. The allegations of an indictment in this Court are to regard the laws of this State only. *State v. Gurney*, xxxvii. 149.

61. An indictment, charging a person as a common seller, includes the charge of making actual sales. *State v. Day*, xxxvii. 244.

62. In criminal pleading, the venue must appear to be within the jurisdiction of the Court. *State v. Conley*, xxix. 78. *State v. Jackson*, xxxix. 291.

63. Thus, where the material facts are alleged to have taken place "in

said county of" C., being the same county named in the margin, it is sufficient. *State v. Conley*, xxxix. 78.

64. An indictment, alleging an offence to have been committed in a town named, and that it belonged to the county at the finding of the bill, without describing in what county it was when the offence was committed, is valid. *State v. Jackson*, xxxix. 291.

65. An indictment against a receiver of stolen goods, knowing them to be stolen, which contains no allegation of the ownership of the property, or that the principal has been duly convicted, is fatally defective. *State v. McAlvon*, xl. 133.

#### (j) *Under statutes.*

66. A conspiracy unlawfully to do an injury to the person of an individual, or to do any unlawful act, injurious to the administration of public justice, is a statute offence. *State v. Ripley*, xxxi. 386.

67. To conspire to "injure the property" of an individual, is a crime against the statute. *State v. Hewett*, xxxi. 396.

68. By the "injury" thus prohibited, is meant an injury to the property *in rem*, by which it is destroyed, or its value diminished. *State v. Hewett*, xxxi. 396.

69. The allegations of an indictment, framed on a penal statute, must charge all the elements of the offence, so as to bring the case of the accused precisely within that described in the statute. *State v. McKenzie*, xlii. 392.

70. An indictment, under R. S. of 1841, c. 157, § 5, charged the defendant with having, "in his custody and possession, at the same time, ten similar false, forged and counterfeit bank bills," &c.;—*Held*, that the allegation was insufficient. The word "similar" is not equivalent to the phrase, "in the similitude of," and cannot be substituted for it. The word "similitude" was designed to be used in the statute as synonymous with "forged" or "counterfeit." *State v. McKenzie*, xlii. 392.

### III. PRACTICE AND EVIDENCE.

71. If the counts in an indictment are so numerous as to embarrass the defence, the Court, in its discretion, may compel the prosecutor to elect on which charge he will proceed. *State v. Nelson*, xxix. 329.

72. In an indictment, one count may refer to another, to save unnecessary repetition. *State v. Nelson*, xxix. 329.

73. A motion to quash an indictment is addressed to the discretion of the Court. *State v. Barnes*, xxix. 561. *State v. Haines*, xxx. 65. *State v. Putnam*, xxxviii. 296. *State v. Taggart*, xxxviii. 298. *State v. Burke*, xxxviii. 574.

73. And, after verdict, such a motion is irregularly before the Court. *State v. Barnes*, xxix. 561.

74. Where an indictment for larceny contains any particulars descriptive of the property stolen, though not necessary to be inserted, they must be proved. *State v. Jackson*, xxx. 29.

75. Demurrer, or motion in arrest of judgment, is the proper remedy against a defective indictment. *State v. Haines*, xxx. 65. *State v. Putnam*, xxxviii. 296. *State v. Taggart*, xxxviii. 298. *State v. Burke*, xxxviii. 574.

76. Upon conviction of a nuisance, the Court may punish by fine only. Or they may cause the nuisance to be abated. But they will not abate, when strangers to the proceedings might be improperly affected. *State v. Haines*, xxx. 65.

77. An indictment for maliciously breaking down a dam, belonging to a person named, cannot be sustained except upon proof that such person had some interest in the dam. *State v. Weeks*, xxx. 182.

78. The right of an administrator to prosecute an indictment may be proved by letters of administration, granted by the Probate Court of another county. *State v. Bangor*, xxx. 341.

79. Where several defendants are jointly indicted for a misdemeanor, and one is put on trial alone, he may introduce, as a witness, the wife of a co-defendant, who stands defaulted on his recognizance. *State v. Worthing*, xxxi. 62.

80. Under the Act of 1842, c. 27, for matters which can be tried in the Supreme Judicial Court alone, the grand jury of the District Court cannot indict, unless the accused has been committed or bound over to the District Court. *State v. Jackson*, xxxii. 40.

81. And where two were thus jointly indicted, only one of whom was bound over or committed, the indictment is good as to him alone. *State v. Jackson*, xxxii. 40.

82. And although the recognizance of such one did not specify for what offence he was to answer, the indictment is valid. *State v. Jackson*, xxxii. 40.

83. In the trial of an indictment, charging a conspiracy to prosecute a person who was not guilty, the government cannot prove that the defendants prosecuted other persons who were guilty. *State v. Walker*, xxxii. 195.

84. In the trial of an indictment for murder, alleging the act to have been done with a specified instrument, it need not be proved to have been done with that particular instrument. But will be sufficient if proved to have been done with some other instrument, if the nature of the violence, and the kind of death occasioned by it, be the same. *State v. Smith*, xxxii. 369.

85. Upon a conviction on an indictment, charging an attempt to commit a rape, without alleging the age of the female upon whom the assault was made, the milder punishment only will be awarded. *State v. Fielding*, xxxii. 585.

86. In the trial of an indictment, concluding against the peace and *contra formam statuti*, the Judge, though requested, need not instruct the jury whether the indictment is, or is not, good at common law. *State v. Hart*, xxxiv. 36.

87. It is no defence to an indictment, for exercising a noxious trade in a public locality, that the municipal authorities have omitted to assign any place for the exercise of such a trade. *State v. Hart*, xxxiv. 36.

88. Judgment upon a verdict in the Supreme Judicial Court, on an indictment found in the District Court, for an offence of which that Court had exclusive jurisdiction, will be arrested, if the case was erroneously transferred to the Supreme Judicial Court for trial, while the District Court was in existence. *State v. Bonney*, xxxiv. 223.

89. An indictment for obstructing a "public street" is sustained by proof of obstruction to a town way. *State v. Beeman*, xxxv. 242.

90. If, on written motion, or plea in abatement it appear that, in finding the bill of indictment, there could not have been a concurrence of twelve lawful grand jurors, the accused cannot lawfully be required to plead to the indictment, or be put upon trial, though the objection be not taken until the arraignment. *State v. Symonds*, xxxvi. 128. *State v. Lightbody*, xxxviii. 200.

91. Upon the overruling of a demurrer to a complaint or indictment, judgment is peremptory. *State v. Merrill*, xxxvii. 329.

92. If the defendant is found guilty of a part only of the offence charged, he is legally acquitted of the rest of the indictment. *State v. Payson*, xxxvii. 361.

93. Where an indictment alleges that the property embezzled was possessed by C. P. B., and by him delivered to the defendant, proof that it was delivered by C. P. B., to some one acting for and by the latter to the defendant, will support the allegation. *State v. Hinckley*, xxxviii. 21.

94. The fact that one is the duly appointed agent of the town furnishes him no protection for selling liquor, if the property and the profits of selling it are his. *State v. Putnam*, xxxviii. 296.

95. After verdict, a *nol. pros.* may be entered as to any part of the count in an indictment, whereby the charge is rendered less criminal. *State v. Burke*, xxxviii. 574.

96. Judgment will not be arrested because some of the counts are bad for duplicity. *State v. Burke*, xxxviii. 574.

97. In the trial upon an indictment, for an assault with a dangerous weapon with intent A. B. to kill and murder, a verdict that the accused was guilty of being accessory before the fact, of an assault with intent to kill A. B., cannot be sustained. *State v. Scannell*, xxxix. 68.

98. Where a party is accused of the greater, the jury may find him guilty of the lesser offence. *State v. Waters*, xxxix. 54.

99. On an indictment for an assault with a dangerous weapon upon A. B., with intent to kill and murder, a general verdict of guilty is sustainable. *State v. Waters*, xxxix. 70.

100. In criminal cases, the jurisdiction of the Supreme Judicial Court extends over offences committed within the territorial limits of the county, whether before or after its incorporation. *State v. Jackson*, xxxix. 291.

101. A motion to quash an indictment, based upon proof to be produced, is unavailable without its production. *State v. Nutting*, xxxix. 359.

102. If, during the trial, the Attorney for the State obtains leave of the Court to enter a *nol. pros.* to a portion of the indictment, he may, at the same trial, if the rights of the respondent are not prejudiced by his dismissal of any witnesses, by leave of the Court, withdraw the entry, and proceed upon the whole indictment. *State v. Nutting*, xxxix. 359.

103. In criminal cases, the facts must have been settled before the case is presented to the full Court. *State v. Moran*, xli. 129.

104. A. was convicted of the crime of forgery. He excepted to certain instructions of the Court, which exceptions were withdrawn at the succeeding term; whereupon, at the suggestion of the County Attorney, the indictment was dismissed, and the defendant discharged without day. A year afterwards, he was again indicted for forgery, and the allegations were in all respects similar to those in the first indictment, to which he pleaded *autre-fois convict*:—*Held*, that such plea was good. *State v. Elden*, xli. 165.



105. A. was arraigned upon an indictment containing four counts; the first two charged an assault in different forms, with intent to murder; the last two, an assault with intent to kill:—*Held*, that all the counts charged but one substantive offence, and the jury may find him guilty of an assault merely, or of an assault with intent to kill, or of an assault with intent to murder. *State v. Phinney*, XLII. 384.

106. The accused is entitled to a verdict upon each and every substantive charge in the indictment; and it is the duty of the Court to require the jury to respond distinctly to the several counts contained therein. *State v. Phinney*, XLII. 384.

107. When there are several counts, and the jury find the defendant guilty on one count, and are silent as to the rest, the legal effect of the verdict is an acquittal as to the others. *State v. Phinney*, XLII. 384.

108. Defects in some of the counts of an indictment will not affect the validity of the remainder. *State v. Hadlock*, XLIII. 282.

# INDORSER.

See *BILLS*, &c., 9, 73, 74, 76, 79, 81, 84, 86, 88, 90, 127.

*CHECKS*, 1, 2, 5. *WRITS*, 6—8.

# INFANT.

1. A suit by husband and wife, to recover land, which she had conveyed when an infant, is a disaffirmance of the conveyance. *Chadbourn v. Rackliff*, xxx. 354. *Webb v. Hall*, xxxv. 336.

2. A deed, executed jointly by husband and wife, is not void as to her, though done during her minority, but only voidable. *Webb v. Hall*, xxxv. 336.

3. An infant promisee of a negotiable note may transfer the same by indorsement; and the act of transfer is voidable only by himself, his heir, or personal representative. *Hardy v. Waters*, xxxviii. 450.

4. And such infant promisee, though under guardianship, may authorize, by parol, another infant to transfer such note by indorsement for him; and the transfer, so made, is valid until avoided. *Hardy v. Waters*, xxxviii. 450.

5. A minor, who voluntarily abandons his father's house without the fault of the latter, carries with him no credit on his father's account, not even for necessities. *Weeks v. Merrow*, xl. 151.

6. Partial payments, made by one of full age, upon a running account, commencing before, and terminating after, the debtor's majority, are to be applied, without special appropriation, in discharge of the earliest items. *Thurlow v. Gilmore*, xl. 378.

7. The implied contract to pay for labor and materials, furnished for the repair of a mill, which a minor was operating, and continued to operate after

he became of age, is not a contract for real estate within the Act of 1845, c. 166. *French v. Moulton*, XLIII. 370.

## INJUNCTION.

1. Where one claimed to exercise a right granted by an Act of the Legislature, clearly unconstitutional, an injunction will not be granted in his favor; but, if nothing appeared *prima facie*, against its constitutionality, an injunction will not be denied on that ground. *Moor v. Veazie*, XXXI. 360.

2. An injunction may issue where there has been a long continued and uninterrupted possession and enjoyment of a right, without a trial at law. *Moor v. Veazie*, XXXI. 360.

3. So, where a State has constitutionally granted a right, and the grant is made upon conditions which have been complied with. The only reason, under such circumstances, for refusing an injunction, would be the unconstitutionality of the grant. *Moor v. Veazie*, XXXI. 360.

4. On a question between owners of a water privilege, as to the alleged use by one of them of a larger share than he is entitled to, an injunction will not be issued, unless the right has been established by law, or been long enjoyed without interruption, or there exists an imperious necessity for it. *Jordan v. Woodward*, XXXVIII. 423. *Morse v. M. W. P. & M. Co.*, XLII. 119.

5. Where a mortgagee proposes to sell and convey the mortgaged property, "to the full extent of the powers derived to or by him, and by virtue of said deed, and not otherwise;" an injunction will not be granted to restrain the mortgagee. *Y. & C. R. R. Co. v. Myers*, XLI. 109.

6. If it shall appear to the Court, when an injunction is asked, that other parties are interested in the result, the Court itself may state the objection and refuse to make a decree; or, if a decree be made, it may be reversed, for this defect, on a rehearing or on an appeal; or, if it be not reversed, it will bind none but the parties to the suit and those claiming under them. *Morse v. M. W. P. & M. Co.*, XLII. 119.

See CONSTITUTIONAL LAW, 32, 33.  
EQUITY, 13, 48.

## INJURY TO ANOTHER'S PROPERTY.

1. In protecting his own property, every person is bound to use ordinary care not to injure the property of others. *Noyes v. Shepherd*, XXX. 173.

2. Imminent danger from fire or flood cannot exempt a person from the use of ordinary care to prevent unnecessary injury to property of others. *Noyes v. Shepherd*, XXX. 173.

3. Ordinary care, under such circumstances, might differ from that degree of caution and prudence, which would be required when no immediate danger was impending. *Noyes v. Shepherd*, XXX. 173.

4. In attempting to rescue his own property from such imminent danger, if one shall injure another's property, the absence of all malicious or evil design, and of all such gross carelessness as would authorize an inference of bad intention, will not protect him from liability. *Noyes v. Shepherd*, xxx. 173.

5. If the party, whose rights or property have been injured, has contributed, by the want of ordinary care, to occasion the injury, he will not be entitled to damages resulting from it. *Noyes v. Shepherd*, xxx. 173.

## INNKEEPER.

See BAILMENT, 8, 9. LIEN.

## INNHOLDERS, RETAILERS, AND COMMON VICTUALERS.

See LIQUORS.

## INSANE PERSONS.

1. By the Act of 1847, c. 33, the selectmen are empowered to adjudicate upon the question of insanity, when applied to for a warrant to send a person to the Insane Hospital for that cause, and also upon the residence of such person. And they are also required to keep a record of their doings in such cases, and to furnish copies of the same to any person, &c. *Eastport v. East Machias*, xxxv. 402.

2. In a suit brought by the town, adjudged by the selectmen to be the residence of such insane person, to recover expenses incurred at the Hospital, an attested copy of such record is admissible. *Eastport v. East Machias*, xxxv. 402. *Eastport v. Belfast*, xl. 262.

3. The Act of 1847, c. 33, for the government of the Insane Hospital, authorizes two justices of the peace, *quorum unus*, to decide upon questions of insanity, when the selectmen, upon a written complaint, shall have refused or neglected so to do. *Insane Hospital v. Belgrade*, xxxv. 497.

4. The justices' jurisdiction is to be settled, before the justices have power to proceed; and their adjudication upon their jurisdiction is conclusive, so far as relates to the person alleged to be insane. *Insane Hospital v. Belgrade*, xxxv. 497.

5. In a suit by the Hospital, to recover the expenses of a person committed as insane by such justices, their jurisdiction is sufficiently established, by their record's declaring that the selectmen had neglected, &c., after a "due application in writing, &c. *Insane Hospital v. Belgrade*, xxxv. 497.

6. It is not necessary to show that the defendants had notice of the proceedings before the justices. *Insane Hospital v. Belgrade*, xxxv. 497.

7. A complaint in writing, made by the wife of a person alleged to be insane, is sufficient; she being a "relative" within the intendment of the statute. *Insane Hospital v. Belgrade*, xxxv. 497.

8. A judgment of the selectmen, adjudicating upon the insanity of a person, cannot be impeached by parol evidence. If erroneous, it may be reversed. *Eastport v. Belfast*, xl. 262.

See EVIDENCE, 221 — 226.

HEIRS, 13.

PAUPER, 31, 47, 73.

## INSANE HOSPITAL.

See INSANE PERSONS.

## INSANITY.

See EVIDENCE, 221 — 226. HEIRS, 13. PAUPER, 31. PRESUMPTION, 8, 9.

## INSOLVENT ESTATES.

1. Where a claim, founded upon a judgment unlawfully obtained, against an insolvent estate, has been allowed by the commissioners of insolvency, and their report has been accepted, a stranger grantee of the deceased may impeach, by plea and proof, such report and acceptance. *Caswell v. Caswell*, xxviii. 232.

2. When the grantee in a warranty deed, who has given his grantor a bond covenanting to remove a mortgage thereon, has deceased, and his estate has been rendered insolvent, all the claims between the estate and the obligee in the bond must be settled before the commissioners of insolvency; and the covenants of warranty in the deed will be thereby rendered inoperative. *Brown v. Staples*, xxviii. 497.

3. A person entitled to a lien upon a house, building or land, under R. S. of 1841, c. 125, is not entitled to a preference over general creditors, when the debtor has deceased, and his estate has been rendered insolvent within one year from the time of granting administration. *Wells, J.*, dissenting. *Severance v. Hammatt*, xxviii. 511.

4. The treasurer of a corporation, having obtained permission to borrow funds in his hands, upon giving his note secured by a mortgage, took the funds, gave his note, but did not execute the mortgage. He died insolvent; and the corporation presented his note to the commissioners, with the usual oath: — *Held*, that the corporation would not thereby be precluded from abandoning the note, and claiming upon the account, as due from the treasurer

in his official capacity; and, in the action for money had and received, the plaintiffs might add a count upon the original account. *Bluehill Academy v. Ellis*, xxxii. 260.

5. After the death, and insolvency of the estate, of the payee of a note, given for land conveyed by a warranty deed, and the title to the land had partially failed, the maker of the note, in a suit against him by the administrator, is entitled, under the insolvency laws, to set off the breach of covenant against the note, although his claim may not have been filed before the commissioners. *Morrison v. Jewell*, xxxiv. 146.

6. An appeal may be taken by a claimant, from the decision of commissioners of insolvency, if the appeal be claimed and notice of it given in writing, at the probate office, within twenty days after the return of the commissioners, and his action be commenced within three months from such return. *Pattee v. Lowe*, xxxv. 121. *Pattee v. Lowe*, xxxvi. 138.

7. There is no prescribed form in which such notice is to be given; and it is not rendered invalid by being addressed only to the register of probate. *Pattee v. Lowe*, xxxv. 121.

8. Proofs of waste and mal-administration are not competent to sustain an action under either of the exceptions, mentioned in R. S. of 1841, c. 109, § 28. *Pattee v. Lowe*, xxxvi. 138.

9. Under Act of 1850, c. 159, an action, commenced before the expiration of a lien, and for the purpose of enforcing it, may be prosecuted to judgment and execution against an administrator or executor, notwithstanding the death and insolvency of the debtor. *Pratt v. Seavey*, xli. 370.

10. So also, in case of a defendant under guardianship by reason of insanity, whose estate has been duly rendered insolvent. *Pratt v. Seavey*, xli. 370.

11. Any defect in the return of commissioners may be cured by an amendment according to the facts; but, if one of the commissioners was not notified nor was present, the report should be re-committed. *Crocker v. Crocker*, xliii. 561.

See ACTION, 65.

EXECUTORS, &c., 24—26.

## INSPECTORS.

1. An inspector of fish is bound to become satisfied, that the article inspected is of the quality and condition required by law, and designated by his brand. *Nickerson v. Thompson*, xxxiii. 433.

2. He is not responsible, as upon a warranty, for the correctness of the brand; but he is responsible for the possession and exercise of skill and care, sufficient for performing the duty required by the statute. *Nickerson v. Thompson*, xxxiii. 433.

3. If an inspector affix his brand to an article, without knowing its condition, he is responsible for all injury occasioned thereby to a person purchasing upon the credit of the brand. *Nickerson v. Thompson*, xxxiii. 433.

4. In a suit for an unskilful and unfaithful performance of inspection duties, the inspector cannot prove the customary mode of other inspectors, or that it is usual for inspectors to take a bond of indemnity against a de-

iciency in the quality or condition of the article branded. *Nickerson v. Thompson*, xxxiii. 433.

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## INSTRUCTIONS TO THE JURY.

See PRACTICE, 62—98.

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## INSURANCE.

- I. POLICY.
  - II. LOSSES.
  - III. PLEADINGS AND EVIDENCE.
- 

### I. POLICY.

- (a) INSURABLE INTEREST.
- (b) VALIDITY.
- (c) WHAT WILL DEFEAT.
- (d) GENERALLY.

#### (a) *Insurable interest.*

1. One part owner of a vessel has no authority, as such, to procure insurance thereon for the other owners. And where several owners claim payment for a loss, where the insurance was thus procured, his authority, or a subsequent ratification of his acts, must be shown. *Blanchard v. Waite*, xxviii. 51. *Sawyer v. Freeman*, xxxv. 542.

2. A *feme covert* was tenant for life in one-third of a lot of land, and tenant for years of the other two-thirds. Her husband erected a house on the land, and caused it to be insured as his property, by the defendants, for four years. One of the defendants' by-laws provided that the policy should be void, if the assured should sell or alienate the property, in whole or in part, without their consent. During the life of the policy, the plaintiff and his wife conveyed to the reversioner her life estate, on condition that the grantee should pay her a fixed sum annually, during her life. The plaintiff, at the same time, conveyed to said reversioner all his interest in the other two-thirds, and took back a mortgage upon the whole estate to secure the payment of several sums in yearly installments. The mortgager entered into possession. The house was afterwards destroyed by fire, before any of the abovementioned sums had become payable:—*Held*, that the plaintiff, at the date of the policy, had an insurable interest in the house; that by said conveyances, the house became a part of the realty; and that said conveyances constituted such an alienation as defeated the policy. *Abbott v. Mut. Fire Ins. Co.*, xxx. 414.

3. One who charters a vessel is not thereby authorized to insure for the owner. *Sawyer v. Freeman*, xxxv. 542.

4. After outfits of a vessel for a fishing voyage have gone into the entire possession of the buyer, the seller has no insurable interest therein, although a lien upon them for his security was agreed between them. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

(b) *Validity.*

5. A contract of insurance is completed, when there is an assent to the terms of it, by the parties, upon a valuable consideration. Neither the giving of the premium note, nor the reception of the policy, are prerequisites. *Blanchard v. Waite*, xxviii. 51.

6. Where a mutual fire insurance company were entitled to a lien on all property insured by them, and where one condition of the insurance was, that if the representation made by the applicant for insurance was materially false, the policy should be void; and, where the insured, in his application, stated that he was the owner of the building insured, when he had only a bond for a deed of it, upon the performance of certain conditions, which have never been performed:—*Held*, that the policy was not obligatory upon the company. *Brown v. Williams*, xxviii. 252. *Pinkham v. Morang*, xli. 587. *Battles v. York Co. M. F. Ins. Co.*, xli. 208.

7. Where, by its charter, a company is prohibited to insure property to an amount exceeding two-thirds of its value, and they voluntarily insure to a greater amount, without any fraud or misrepresentation on the part of the insured, the policy is not thereby annulled. *Williams v. N. E. M. F. Ins. Co.*, xxxi. 219.

8. A vote by a mutual insurance company that, if the assessments upon its premium notes should not be punctually paid, the policy should be suspended, is of no validity, unless assented to by the insured. *N. E. M. F. Ins. Co. v. Butler*, xxxiv. 451.

9. No by-law of an insurance company can enlarge its corporate powers. *Andrews v. Union M. F. Ins. Co.*, xxxvii. 256.

10. Where the charter only authorized insurance against fire, a by-law referred to in the policy, recognizing damages by lightning as one of the risks assumed, imposes no obligation upon the company to pay for losses other than by fire. *Andrews v. Union M. F. Ins. Co.*, xxxvii. 256.

11. A policy will not be invalid, although the commencement and termination of the risk are not distinctly stated, if the intention of the parties can be gathered from its provisions. And any obscurity in its meaning may be removed by reference to the situation of the parties. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

12. A warranty by the assured, in relation to the existence of a particular fact, must be strictly true, or the policy will be void; and that, too, whether material or not. *Battles v. York Co. Mut. Fire Ins. Co.*, xli. 208.

13. When a policy has been executed, and notice thereof given to the assured, its actual delivery is not necessary to complete the contract. *Bragdon v. Appleton Mut. Fire Ins. Co.*, xlii. 259.

See INSURANCE, 79.

(c) *What will defeat.*

14. Where one condition in a policy was, that in case of loss, the assured, if required, shall submit to an examination under oath, and answer all questions relating to such loss, or to their claim therefor, and subscribe the same; and where such examination was once made and completed, the assured cannot be required to submit to a further examination under oath, although he may have agreed to. *Moore v. Protection Ins. Co.*, xxix. 97.

15. Where the policy provides, that it shall be void, if the risk shall be increased by any means whatsoever within the control of the assured; or if such premises, with the assent of the assured, shall be occupied in any way so as to render the risk more hazardous than at the time of insuring; and among the articles denominated hazardous, was cotton in bales; yet, if the cotton in bales was merely kept for sale as a part of the stock of dry goods, it would not vitiate the policy, unless the jury should find that the keeping of such cotton increased the risk. *Moore v. Protection Ins. Co.* xxix. 97.

16. And where one of the conditions protected the insurers against the appropriating, applying or using the store for keeping or storing goods of a hazardous character:—*Held*, that the keeping of a hazardous article among the other goods was not an infraction of that condition. *Moore v. Protection Ins. Co.*, xxix. 97.

17. The charter of an insurance company provided, that if the insured should alienate the property the policy should be void:—*Held*, that evidence of bankruptcy was an alienation. *Adams v. Rockingham M. F. Ins. Co.*, xxix. 292.

18. Also a conveyance by an absolute deed, though the grantor received back an unsealed agreement to re-convey upon the payment of a specified sum. *Adams v. Rockingham M. F. Ins. Co.*, xxix. 292.

19. A violation of a warranty by the insured will defeat the policy. *Richards v. Protection Ins. Co.*, xxx. 273.

20. Thus, where a policy was taken upon a stock, consisting of not hazardous merchandize, and the insured kept, among other goods, for sale, oil and glass, which, in the "conditions," were denominated "hazardous," the policy was thereby vacated. *WELLS, J.*, dissenting. *Richards v. Protection Ins. Co.*, xxx. 273.

21. To constitute an alienation, it is not necessary that there should be an absolute transfer of the whole or any distinct portion of the property. Such a disposition of it, as that any property has been passed to another, is sufficient. *Abbott v. M. F. Ins. Co.* xxx. 414. *Vide*, INSURANCE, 29.

22. Though representations be untrue, yet, if not fraudulently made, and if they are immaterial, and produce no injury to the defendant, they will not vacate the policy. *Williams v. N. E. Mut. Fire Ins. Co.*, xxxi. 219. *Battles v. York Co. Mut. Fire Ins. Co.*, xli. 208.

23. A vote, by a mutual insurance company, that, if the assessments upon its premium notes should not be punctually paid, the insurance should be suspended, if unassented to, will not impair the force of the policy. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

24. Neither will a neglect or refusal to pay such assessments excuse the insurers from paying the insurance. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.



25. If a policy is to be vacated by a subsequently acquired insurance, unassented to by the first insurers, yet, if the second policy be void, it will not defeat the former one, even though the subsequent insurers may have paid the amount they insured. *Philbrook v. N. E. Mut. Fire Ins. Co.*, xxxvii. 137.

26. Though a by-law of an insurance company provides that any of its policies upon property *previously* insured shall be void, unless such previous insurance be indorsed on the policy at the time of its being issued; still, such by-law is inoperative, if, in the policy itself, such previous insurance be recognized and approved. *Philbrook v. N. E. Mut. Fire Ins. Co.*, xxxvii. 137.

27. Two policies upon property, issued from different companies, but both did not exceed three-fourths in value of the property:—*Held*, that the above mentioned by-law would not vacate the last policy, which gave leave to keep insured, in other companies, an additional sum, provided all the sums insured should not exceed in value, three-fourths of the property insured. *Philbrook v. N. E. Mut. Fire Ins. Co.*, xxxvii. 137.

28. Where the policy required the assured to notify the company of any increase to the risk of property insured, or the policy would be void, a neglect to give such notice renders the policy absolutely void. And a subsequent assessment for losses upon such policy will not revive it. *Gardiner v. Piscataquis Mut. Fire Ins. Co.* xxxviii. 439.

29. The charter of an insurance company provided “that, when the property insured shall be alienated, by sale or otherwise, the policy shall thereupon be void:”—*Held*, that a mortgage of the insured property is not an alienation, within the meaning of the Act. *Pollard v. Som. Mut. Fire Ins. Co.*, xlii. 221.

30. Where a policy of insurance, upon a vessel, provides that the insurers shall not be answerable for any loss which may arise in consequence of seizure for or on account of illicit or prohibited trade, or trade in articles contraband of war, but the judgment of a foreign colonial court shall not be conclusive of those facts; such judgment is *prima facie* evidence of the facts, and must be held conclusive in the absence of proof to impeach it. *Decrow v. Waldo Mut. Ins. Co.* xliii. 460.

31. An attempt to trade in violation of law is within the provisions of such policy. *Decrow v. Waldo Mut. Ins. Co.*, xliii. 460.

(d) *Generally.*

32. In a contract of insurance upon time, the time is to be reckoned according to the longitude of the place where the contract was made and is to be performed. *Walker v. Protection Ins. Co.*, xxix. 317.

33. The description of property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty, that *all* the property was of the class described, not only at the time of the taking the policy, but that it shall continue to be of that description during the continuance of the policy. *Richards v. Protection Ins. Co.* xxx. 273.

34. Warranties are a part of a completed contract. Representations are a part of the preliminary proceedings, which propose the making of a contract. *Williams v. New England M. F. Ins. Co.*, xxxi. 219.

35. Representations, in an application for insurance, become warranties, if referred to in the policy, and are expressly made a part of it. *Williams v. New England M. F. Ins. Co.*, xxxi. 219.

36. When, by the terms of the policy, the application is made part of the policy, such application is as much a part of the contract as though it were incorporated into the policy itself. *Williams v. New England M. F. Ins. Co.*, xxxi. 219. *Philbrook v. New England M. F. Ins. Co.*, xxxvii. 137.

37. It seems, a warranty that there are no stoves in the building insured, is a warranty that stoves are not to be permanently used in it. *Williams v. New England M. F. Ins. Co.*, xxxi. 219.

38. In the insurance of a dwellinghouse in the process of being finished, a warranty that there are to be no stoves in it, means that no stove is to be habitually kept and used in it. The use of a stove for a few days, for a purpose connected with the finishing of the house, is not a violation of such a warranty. *Williams v. New England M. F. Ins. Co.*, xxxi. 219.

39. The statements made in an application merely for leave to obtain an additional insurance, in another office, are representations and not warranties. *Williams v. New England M. F. Ins. Co.*, xxxi. 219.

40. A policy, issued by a mutual insurance company, and a premium note, given at the same time, are independent contracts; and the neglect of one party to perform will not absolve the other party from performance. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

41. A vote by such company, that, if its assessments shall not be punctually paid, the insurance should be suspended, is invalid if unassented to; and will not relieve either the insurer or the insured from their respective liabilities. *N. E. Mut. Fire Ins. Co. v. Butler*, xxxiv. 451.

42. The collection of an assessment, ordered by a company, after a forfeiture of the policy by the act of the insured, will not revive the policy. *Philbrook v. N. E. Mut. Fire Ins. Co.*, xxxvii. 137. *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, xxxviii. 439.

43. In the construction of written policies, it is competent to take into consideration the subject matter, and the obvious scope and design, and even the situation of the parties. *Philbrook v. N. E. Mut. Fire Ins. Co.*, xxxvii. 137. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

44. When the place from which a voyage is to be made is not stated in the policy, evidence that the vessel was at a certain port when the policy was executed, and there received the cargo insured, and sailed thence on the voyage, determines the risk to commence from that place. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

45. In an application, the words "for the benefit of captain and owners," and in a policy, "on account of whom it may concern," do not necessarily secure insurance, in case of loss, to one having an interest in the property insured. *Haynes v. Rowe*, xl. 181.

46. Where the owner, and master who sails a vessel on shares, direct a person to procure an insurance on freight, it may well be presumed that they are alike interested in the policy. *Haynes v. Rowe*, xl. 181.

47. And where the owner became bound for the master for supplies, and, by consent of the master, his security was to be the insurance on the freight, such owner is entitled to indemnity from the insurance, although the master never assigned the policy. *Haynes v. Rowe*, xl. 181.

48. The insured is bound to make a true and full representation concerning all matters deemed material to the risk, or which may affect the amount of premium, if inquired of by the company. *Battles v. York Co. Mut. Fire Ins. Co.*, xli. 208.

49. Where the by-laws of a company stipulate that the risk upon their policy shall be suspended, if the insured shall neglect for a given time, when personally called upon, to pay any assessment duly made, the defendant company cannot be considered as having waived their right to be exempted from liability for the plaintiff's loss, by their subsequent assessment and collection to cover it. *Nash v. Union Mut. Ins. Co.*, XLIII. 343.

50. A demand, made by one having a receipt in full from the proper authority, in discharge of the liability, is as much a personal demand as though made by the one who signed the receipt. *Nash v. Union Mut. Ins. Co.*, XLIII. 343.

## II. LOSSES.

51. An *actual* total loss is a destruction of the property insured, so that nothing valuable would remain upon abandonment. In such case, no abandonment is necessary. *Walker v. Protection Ins. Co.*, XXIX. 317.

52. A *constructive* total loss is where part of the property survives the peril, without a total destruction of the thing insured, or where rights or claims remain to the insured as owner. In such case, abandonment is necessary. *Walker v. Protection Ins. Co.*, XXIX. 317.

53. Where, by reason of winds and waves, a vessel upon the high seas has become a wreck, incapable of being brought into port, she is considered an *actual* total loss. *Walker v. Protection Ins. Co.*, XXIX. 317.

54. Under a marine policy, if the disaster was such as to render a sale by the master necessary, it constituted a constructive total loss. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

55. If the sale by the master was necessary, and warranted by law, it would constitute a constructive total loss, even without an abandonment. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

56. A formal offer to abandon, made after such sale, cannot impair the right of sale which the master previously had. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

57. The right to sell, as well as the right to abandon, is to be determined by the state of facts existing at the time. In either case, the rights of the parties become vested, when the sale or abandonment is properly made. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

58. Though, immediately after the sale, the vessel was repaired by the purchaser, at the port of disaster, that fact does not prove the sale to have been unnecessary. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

59. The right to abandon is not necessarily lost by an unwarranted and therefore ineffectual sale by the master. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

60. It is not indispensable that a plaintiff, in order to recover for a total loss, should furnish an adjustment as of a partial loss. *Fuller v. Kennebec Mut. Ins. Co.*, XXXI. 325.

61. If any part of a perishable article, shipped, arrives in specie, at its port of destination, or, by the exercise of reasonable care and diligence, can be carried there in that condition, there can be no total loss, although it may be worthless there. *Williams v. Kennebec Mut. Ins. Co.*, XXXI. 455.

62. If, by reason of the perils insured against, no part of it can be carried there, in specie, the loss is total. *Williams v. Kennebec Mut. Ins. Co.*, xxxi. 455.

63. In such case, abandonment is not necessary, though a portion of the article was in such condition as to be sold by the master for a sum certain, at the port of disaster. *Williams v. Kennebec Mut. Ins. Co.*, xxxi. 455.

64. Where there is such a total loss of the cargo, the insured is entitled to recover, as for a total loss of the freight. *Williams v. Kennebec Mut. Ins. Co.*, xxxi. 455.

65. If the expense of sending the cargo to the port of destination, by another vessel, will exceed a moiety of the stipulated freight, the insured may abandon, and then recover for a total loss. *Williams v. Kennebec Mut. Ins. Co.*, xxxi. 455.

66. Whether the master has authority to sell a disabled vessel, is to be determined by the circumstances, at the time and place of sale. *Prince v. Ocean Ins. Co.*, xl. 481.

67. A survey is presumed to be correct, but is not conclusive. It cannot control the rights of parties, but is important evidence, designed to protect the rights of all concerned. *Prince v. Ocean Ins. Co.*, xl. 481.

68. In the sale of a vessel injured, by a master, he must show that he proceeded correctly, and from justifiable necessity. *Prince v. Ocean Ins. Co.*, xl. 481.

69. No qualification to intensify the term necessity, in instructions to the jury, in such case, is necessary. *Prince v. Ocean Ins. Co.*, xl. 481.

70. A master, owning a part of a vessel thus sold, is justifiable under the same circumstances as if he were not a part owner. *Prince v. Ocean Ins. Co.*, xl. 481.

71. Where a sale is thus made of a vessel insured, no abandonment is required for the assured to recover for a total loss. *Prince v. Ocean Ins. Co.*, xl. 481.

### III. PLEADINGS AND EVIDENCE.

72. The affidavit of the assured, made in pursuance of the policy, and his examination before the company's agent, after having been introduced without objection, are admissible as to the amount of the loss. *Moore v. Protection Ins. Co.*, xxix. 97.

73. It seems, that the opinions of experienced masters of vessels are admissible, as to the probable expense of repairing a wrecked vessel, and the mode of making them. *Walker v. Protection Ins. Co.*, xxix. 317.

74. If one, having an interest in mortgaged property, procure insurance in his own name, with the stipulation that the loss shall be paid to the mortgagee, a suit may be maintained by the mortgagee. *Motley v. Manufacturers' Ins. Co.* xxix. 337.

75. The bringing of such a suit is a ratification of the procuring of the insurance for his benefit. *Motley v. Manufacturers' Ins. Co.*, xxix. 337.

76. An action may be maintained in this State, against an insurance corporation, established by the Legislature of another State, if, by its charter, jurisdiction is not expressly limited to its own State. *Williams v. New England Mutual Fire Ins. Co.*, xxix. 465.

77. The description of property in the policy, when the rate of premium is thereby affected, operates as a warranty, and is in the nature of a condition precedent, a performance of which must be shown prior to recovery. *Richards v. Protection Ins. Co.*, xxx. 273.

78. Where the conditions annexed to a policy divided insurable articles into several classes, some as being more hazardous, and therefore requiring a higher rate of premium than others, parties cannot prove such classification inaccurate. *Richards v. Protection Ins. Co.* xxx. 273.

79. A policy, insuring \$1700, upon a mill and fixed machinery, and \$150, upon movable machinery, proceeded in written words:—"said insured being the lessee of said mill for one year from, &c., and having paid the rent therefor, of, &c., which interest, diminishing, day by day, in proportion to the whole rent for the year, is hereby insured:"—*Held*, that the policy was a valued one, although, in the printed part of it, there was a provision that the "loss or damage should be estimated according to the true and actual cash value, at the time such loss or damage shall happen:"—

That the manuscript provision was the agreed basis, upon which to ascertain the true and just value:—and

That it is not competent for the defendant, (except for the purpose of proving fraud,) to show that the rent, paid by the insured for the mill, was less than the sum stated in the policy. *Cushman v. North Western Ins. Co.*, xxxiv. 487.

80. No action can be maintained upon a policy where the assured had no interest in the property insured, when the policy was executed or the property was lost. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

81. If, after the commencement of a voyage, the vessel stops at a neighboring port for additional men, under the plea of *usage*, such an usage must be proved as would show that the parties had reference to it when the insurance was obtained. *Folsom v. Mer. Mut. Mar. Ins. Co.*, xxxviii. 414.

82. Where, by the terms of a policy, it is to be void in case of an increase to the risk, without notice to the officers of the company, no action can be maintained on such policy, when the risk was increased without notice, although the loss did not happen in consequence of such increased risk. *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, xxxviii. 439.

83. To maintain an action for an assessment, upon a premium note, a mutual insurance company must show such assessment to have been legally made. *Augusta Mut. Fire Ins. Co. v. French*, xxxix. 522.

84. The right of one to recover upon a policy must depend upon his interest acquired as a party to the contract. *Haynes v. Rowe*, xl. 181.

85. The assignee of a policy, transferred with the assent of the company, may maintain an action, in case of a loss, in the name of the assignor for the amount insured; and no subsequent act of the assignor can prejudice the assignee's rights. *Pollard v. Somerset Mut. Fire Ins. Co.*, xlii. 221.

86. The assured having mortgaged his property and assigned his policy, the assignee must bring his action in the name of the assignor, although the assignment was made with the consent of the insurers, unless they have made an express promise to the assignee. *Pollard v. Somerset Mut. Fire Ins. Co.*, xlii. 221.

## INTEREST.

1. Interest, on the balance of an account stated, is recoverable from the date of the settlement. *Crosby v. Otis*, xxxii. 256.

2. When a note is made "with interest to be paid annually," whether payable by installments or not, the interest which may have accrued in any year may be recovered, if sued for before the whole of the principal becomes payable. *Bannister v. Roberts*, xxxv. 75.

3. If no suit be commenced for that purpose, until after that time, interest upon the interest, not paid from the time when it should have been paid, cannot be recovered in a suit for the principal and interest due upon the note. *Bannister v. Roberts*, xxxv. 75.

4. In making up judgment upon an award, interest on the amount awarded cannot be included. *Kendall v. W. P. Co.*, xxxvi. 19.

5. Upon money in the hands of an adjudged trustee, interest is taxable against him after demand. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

6. Where partial payments, (whether voluntary or otherwise,) have been made on a note, the rule is to compute interest on the principal, from the time when the interest commenced to the first time when a payment was made, which exceeds, either alone or in conjunction with preceding payments, if any, the interest at that time due; add the interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, if any, and the remainder forms a new principal, on which compute and subtract the interest as upon the first principal, and proceed in this manner to the time of the judgment. *Leonard v. Wildes*, xxxvi. 265.

7. Upon a sum acknowledged to be due at a time specified, between the *cestui que trust* and the trustee, interest may legally be allowed. *Miller v. Whittier*, xxxvi. 577.

8. On a bill in equity to redeem land mortgaged, the master's report shew the debt secured to be a note, dated Aug. 1838, payable with interest semi-annually, upon which a payment of \$190 was made April, 1845. In Feb., 1848, the parties were together, when they computed and compounded the interest semi-annually, from the date of the note to that time, for which sum the mortgager gave his note, which the mortgagee collected, the \$190 having been wholly unnoticed. The mortgager also made two other payments on the note, in Jan., 1851, and Jan., 1852, of \$50 each.

The master computed and compounded the interest semi-annually from the date of the note to April, 1845, and deducted the \$190 from the amount. The balance was made a new principal, upon which the interest was compounded semi-annually until Feb. 1848. Upon that balance, simple interest was computed to the payment in Jan., 1851, which overpaid the note by \$21,26. Upon that sum, simple interest to Jan., 1852, when the second payment of \$50 increased the overpayment to \$72,55; upon which sum simple interest was computed to the time of the decree:—*Held*, that by giving the note of Feb., 1848, the mortgager agreed to pay interest reckoned in that mode; and that the decree did justice to both parties, without violating the statutes of usury. *Farwell v. Sturdivant*, xxxvii. 308.

9. Interest on the debt of a judgment creditor can be computed only to the time when the land was taken, in making the levy. *Brown v. Lunt*, xxxvii. 423.

10. Upon proceedings in equity to redeem a mortgage to secure notes on annual interest, in estimating the amount due, compound interest cannot be reckoned. *HATHAWAY, J.*, dissenting. *Kittredge v. McLaughlin*, xxxviii. 513.

11. In an action against a town for an injury, caused by a defective highway, no interest can be added by the jury to the sum found as damages. *Sargent v. Hampden*, xxxviii. 581.

12. An administrator, who, under license, sells his intestate's real estate, and uses the avails thereof in his business, is chargeable with lawful interest thereon, while using it. *Paine v. Paulk*, xxxix. 15.

13. The defendant agreed to purchase lumber at a certain price per M., and pay the freight. When it was delivered, he refused to pay the freight, and plaintiff told him he must pay \$40 per M., unless he paid the freight: — *Held*, that the defendant, by his refusal, repudiated the contract, and by keeping the lumber he was chargeable at the price last fixed; but with interest only from the date of the writ. *Patten v. Hood*, xl. 457.

14. *It seems*, that the true principle, upon which to base the allowance of interest in the absence of express stipulation, is to charge it upon the party who is in fault. *Hall v. Huckins*, xli. 574.

## INTOXICATING LIQUORS.

See LIQUORS.

## JOINT STOCK ASSOCIATIONS.

1. Articles of agreement between members of an unincorporated association, stipulated that the capital stock should be divided into shares, which should be transferrable; that trustees should be appointed to manage the affairs, in whom all the property should vest in trust. Accordingly, trustees were appointed, who purchased real and personal estate and proceeded to the transaction of business. Shares were transferred from time to time, until twenty-nine fortieths were held by one person: — *Held*, that a sale by him of twenty-nine fortieths of all the land and property which belonged to the association dissolved it; and the persons who owned the shares, at the time of the dissolution, were entitled, according to their number of shares, to all the avails of the company, and liable to contribute, in the same proportions, to all the debts of the company. *Smith v. Virgin*, xxxiii. 148.

2. Joint stock associations, though with a common object, and for the purpose of dealing exclusively in personal property, and with a community of profit or loss, are not necessarily co-partnerships. *Cox v. Bodfish*, xxxv. 302.

3. In a suit against the depository of such an association, by one of its members, to recover his aliquot part of the joint fund, it is no defence that available debts are yet due to the company. *Cox v. Bodfish*, xxxv. 302.

4. An association was formed to operate by trade and labor in a distant state. Its constitution divided the stock into shares of \$500, and provided

that each member, by subscribing to render his personal labor, should be entitled to another share, but that desertion from the service should forfeit all his interest in the association. C. became a stockholder, but did not subscribe for personal services. He, however, authorized W., as his substitute, to labor and vote as representing his share abroad, and W. was permitted to act and vote accordingly, though he had never subscribed for stock. W. afterwards deserted the employment:—*Held*, that the substitution conferred upon W. no share in the stock, and that C's interest in the association was not forfeited by the desertion, although such a forfeiture had been declared by the unanimous vote of the company. *Cox v. Bodfish*, xxxv. 302.

## JOINT TENANTS AND TENANTS IN COMMON.

- I. CREATION, AND SEVERANCE OF SUCH ESTATES.
- II. RIGHTS AND LIABILITIES.
- III. REMEDIES.

### I. CREATION, AND SEVERANCE OF SUCH ESTATES.

1. Where A. and the wife of B. are co-tenants of land, division deeds made by A. and B. do not destroy the co-tenancy. *Trash v. Patterson*, xxix. 499.

2. The sale of personal property by one tenant in common does not vest the property in the vendee, as against another tenant in common. *Wheeler v. Wheeler*, xxxiii. 347.

3. Of lands held by tenants in common, a conveyance by one of them of a part, by metes and bounds, is inoperative, as against the others. *Soutter v. Atwood*, xxxiv. 153.

4. Two persons owned land as tenants in common. One of them conveyed his undivided half to M., taking back a mortgage to secure the purchase money. The other conveyed his undivided half to G. M. and G. divided the land, to M. the north half and to G. the south half, by deeds. G. then conveyed the south half by metes and bounds, which became vested in the plaintiff, who afterwards took from G. a deed of an undivided half of the whole land. The defendants hold under the mortgage, which was foreclosed, but have occupied both halves, by their lessees, and have received the rents therefor:—*Held*,—

That the title of G., by his division deed, became limited to the south half; and that his subsequent conveyance to the plaintiffs of the undivided half was inoperative:—

That, as the title of the plaintiff extended only to the south half, he could maintain no process for partition of the whole:—

And that, in a suit at equity, the defendants could not be coerced to convey to the plaintiff any portion of their interest in the tract; nor to apply for a partition of it; nor to account to the plaintiff for any portion of the rents. *Soutter v. Atwood*, xxxiv. 153.

5. Mere possession of the common property by one tenant is not evidence of an ouster of his co-tenants. *Small v. Clifford*, xxxviii. 213. *Wass v. Bucknam*, xxxviii. 356.



6. But a notorious claim by one tenant of exclusive right in connection with exclusive possession of the common property, is an actual ouster of the other tenants. *Small v. Clifford*, xxxviii. 213.

## II. RIGHTS AND LIABILITIES.

7. The conveyance of a tenant in common, attempting to convey by metes and bounds a portion of the common estate, cannot impair or vary the rights of a co-tenant. *Soutter v. Porter*, xxvii. 405.

8. Such conveyance will not necessarily be inoperative upon his own rights or the rights of others. The law will give effect to such conveyance, so far as it may do so consistently with the preservation of the entire rights of the co-tenant, and no further. *Soutter v. Porter*, xxvii. 405.

9. If the estate so conveyed, or any part of it, shall be assigned, upon partition, to the right of the grantor or his assignee, the conveyance embracing it may operate and convey the title to the grantee. *Soutter v. Porter*, xxvii. 405.

10. It cannot operate, however, contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. *Soutter v. Porter*, xxvii. 405.

11. Where trespass has been committed upon land, of which the plaintiff is part owner, his right of action cannot be defeated by a subsequent payment to his co-tenants. *Longfellow v. Quimby*, xxix. 196.

12. Land owned in common by different proprietors, which has been taxed and sold at auction, *in solido*, for the payment of county taxes, may be redeemed by any one of the co-tenants. *Watkins v. Eaton*, xxx. 529. *Loomis v. Pingree*, xliii. 299.

13. The purchaser may refuse to receive any part, without the whole, of the amount for which he is entitled to hold the land. *Watkins v. Eaton*, xxx. 529.

14. When one of the proprietors has redeemed his own part and also the part of another co-tenant, and taken the purchaser's release thereof, a subsequent tender to the purchaser, by such co-tenant, of his proportion of the amount for which the land had been holden, though made within the time allowed for redeeming, is of no effect. *Watkins v. Eaton*, xxx. 529.

15. Such redemption of another's share, by one co-tenant, will transfer to him a lien thereon for a reimbursement, though it will give to him no right of action. *Watkins v. Eaton*, xxx. 529.

16. Until such reimbursement has been made or tendered to the co-tenant who redeemed, or to the owner holding under him, no action can be maintained, by the delinquent co-tenant, against either of them for the recovery of the land. *Watkins v. Eaton*, xxx. 529.

17. If, after the time of redemption had expired, the auction purchaser should sell and convey the land to one of the co-tenants, the other co-tenants could derive no rights therefrom. *Watkins v. Eaton*, xxx. 529.

18. Where one tenant in common has received the rents and profits of the common property, he is accountable, in assumpsit, to a co-tenant, for his share. *Buck v. Spofford*, xxxi. 34.

19. In such action, it is no defence in whole or in part, that the defendant

has incurred expense in repairs upon the mill, unless such repairs were made pursuant to R. S. of 1841, c. 86. *Buck v. Spofford*, xxxi. 34.

20. The law will justify no repair, whereby to charge one of the part owners against his consent, except so far as to make the property "serviceable." *Buck v. Spofford*, xxxi. 34.

21. But if, after having pursued the statute procedure, a part owner has made repairs beyond what was necessary to render the property "serviceable," his lien will be good for such part of them as were necessary for that purpose. *Buck v. Spofford*, xxxi. 34.

22. If he has been reimbursed to that extent out of the joint profits, he will be accountable in assumpsit to his co-tenant, for his share of the surplus, if any. *Buck v. Spofford*, xxxi. 34.

23. In tenancy in common, each party has a separate and distinct, although an undivided, interest, and possesses the whole of an undivided moiety of the property, and not an undivided moiety of the whole property. *Knowlton v. Reed*, xxxviii. 246.

24. A tenant in common can sell only his undivided right. *Knowlton v. Reed*, xxxviii. 246.

25. One sole seized of a parcel of land, with mill privileges attached, has no power to convey, with such land, the right of flowing lands above, held by him in common with another. *Hutchinson v. Chase*, xxxix. 508.

26. When a mill-dam, owned by tenants in common, flows their common lands above, a release by one to the other of the mill sites, and all the privileges and appurtenances thereto belonging, will authorize the grantee to continue the flowing of the lands above, and to transmit that right to his grantees without being liable in damages. *Hutchinson v. Chase*, xxxix. 508.

27. The possession of the common property, by one of the tenants, will not prevent his co-tenants from making an effectual transfer to another, of their rights therein. *Bird v. Bird*, xl. 398.

28. The possession of one tenant in common is the possession of another, which each has a right to for himself and all others, against strangers. *Loomis v. Pingree*, xliii. 299.

### III. REMEDIES.

29. If, in tort, the plaintiff be but a tenant in common with others, of the property taken or injured, the objection is available only in abatement, or by an apportionment of damage. *Holmes v. Sprowl*, xxxi. 73.

30. One co-tenant may recover against another, by action of trespass, treble damages for strip and waste committed by him during the pendency of a petition for partition, though the defendant be petitioner. *Maxwell v. Maxwell*, xxxi. 184.

31. In such action, as well as in assumpsit, if the whole of an averment might be stricken out, and yet leave sufficient allegations upon which to support an action, such averment need not be proved. *Maxwell v. Maxwell*, xxxi. 184.

32. The declaration, in such suit, need not name the other co-tenants. In suits against strangers to the common property, the names must be stated, if known. *Maxwell v. Maxwell*, xxxi. 184.

33. A tenant in common with others, of a meeting-house, may maintain trespass for injuring one of the pews, against a person having no title either in the pew or the house. *Murray v. Cargill*, xxxii. 517.

34. Tenants in common may join or sever in personal actions for injuries to their land. *Palmer v. Dougherty*, xxxiii. 502.

35. When there are unadjusted claims between several part owners of a vessel, growing out of the employment of the joint property, no action lies by one against the other for contribution toward any particular expense, or for a share of any particular item of profit. *Hardy v. Sprowl*, xxxiii. 508.

36. No action by one part owner against another, relative to such expenses or profits, can be sustained, except such as shall adjust all their respective claims together. If no other mode can be agreed upon, the remedy is by action of account. *Hardy v. Sprowl*, xxxiii. 508.

37. In trespass for injury to personal property, owned by the plaintiffs jointly with other co-tenants, damages may be recovered in proportion to the plaintiff's ownership. *Jones v. Lowell*, xxxv. 538.

38. All the co-tenants must join in a complaint for flowing land, owned by tenants in common, by means of a mill-dam. *Tucker v. Campbell*, xxxvi. 346.

39. In an action by one tenant in common against another, for selling stumpage from the common land without authority, it is no defence that the plaintiff, previously, had wrongfully sold stumpage from the same land. *Dwinell v. Larrabee*, xxxviii. 464.

40. One of the owners of chattels, held by tenants in common, may maintain an action, for the value of his property, against any one who appropriates the whole to the exclusion of his possession in common. *Boobier v. Boobier*, xxxix. 406.

41. Assumpsit, by one tenant in common, against his co-tenant, for use and occupation of the common property, will not lie on an implied promise. *Gowen v. Shaw*, xl. 56. *Moses v. Ross*, xli. 360.

42. But, when a tenant in common has received more than his share of the rents of the common property in money, or as bailiff of the other, assumpsit will lie. *Gowen v. Shaw*, xl. 56. *Moses v. Ross*, xli. 360.

43. In a suit by one co-tenant against another, based on the Act of 1848, c. 61, it must be alleged and proved that the joint estate has yielded "rents, profits or income," and that the defendant has taken the common property "without the consent of his co-tenant. *Moses v. Ross*, xli. 360.

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## JUDGMENT.

- I. RENDITION AND ENTERING OF JUDGMENT.
- II. ARREST OF.
- III. EFFECT OF.
- IV. ACTIONS ON, AND SATISFACTION OF.
- V. JUDGMENTS OF COURTS OF OTHER STATES.

## I. RENDITION AND ENTERING OF JUDGMENT.

1. No valid judgment can be rendered on the report of referees under a statute submission, except by consent, without allowing to the aggrieved party the time prescribed by statute, in which to present exceptions. *Crooker v. Buck*, xli. 355.

See ERROR.

JUSTICE OF THE PEACE, 25.

## II. ARREST OF JUDGMENT.

2. On motion in arrest of judgment for selling spirituous liquor by retail, the rights of an importer to sell foreign liquor cannot be called in aid of the defendant. *State v. Gurney*, xxxvii. 156.

3. Judgment will not be arrested because some of the counts are bad for duplicity. *State v. Burke*, xxxviii. 574.

4. A motion in arrest of judgment can only be entertained for matters apparent on inspection of the record. Where proof is required to support such motion, it cannot prevail. *State v. Bangor*, xxxviii. 592.

5. The 26th rule of the Court, promulgated in 1820, in regard to the time for filing motions in arrest of judgment, had reference only to civil cases. *State v. Hobbs*, xxxix. 212. *State v. McAlwon*, xl. 133.

6. The principle upon which a judgment on penal statutes in behalf of the State is arrested, is that all which has been alleged in the complaint or indictment may be true, and yet the person convicted may not have committed any offence. *State v. Hobbs*, xxxix. 212.

## III. EFFECT OF A JUDGMENT.

(a) AS TO PARTIES.

(b) GENERALLY.

(a) *As to parties.*

7. A judgment is evidence of the amount of indebtedness between the parties to it; but is not binding as to third persons, not parties or privies thereto. *Sargent v. Salmond*, xxvii. 539.

8. The adjudication of commissioners, to determine whether an execution should or should not run against the body of a debtor, &c., has the character of a judgment, and cannot be set aside on motion. *How v. Newbegin*, xxxiv. 15.

9. One, against whom judgments have been obtained, can maintain no action on the case against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed. *Dunlap v. Glidden*, xxxi. 435. *Smith v. Abbott*, xl. 442.

10. A judgment cannot be impeached directly, indirectly or collaterally. While it remains unreversed, it is conclusive upon the parties in every respect. *Pease v. Whitten*, xxxi. 117. *Footman v. Stetson*, xxxii. 17. *Woodman v. Smith*, xxxvii. 21. *Smith v. Abbott*, xl. 442.

11. Judgment in a suit, wherein a set-off account had been filed, is conclusive upon that account, unless some of its items had been withdrawn, which can be done in writing by the parties. *Smith v. Berry*, xxxvii. 298.

12. A judgment against a corporation is conclusive upon parties and privies. *Came v. Brigham*, xxxix. 35.

13. Judgments are conclusive upon the parties to them, in reference only to such matters as were directly in issue in the case. *Lord v. Chadbourne*, xlii. 429.

14. When the proceedings are *in rem*, the decree of the Court is an adjudication upon the *status* of some particular subject, and is binding upon all the parties. *Lord v. Chadbourne*, xlii. 429.

15. Judgments are binding upon all parties and privies thereto, until reversed. *Cole v. Butler*, xliii. 401.

See ARBITRATION, 67, 71, 72.

(b) *Generally.*

16. The contract, upon which a judgment at law has been recovered, is merged and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of the recovery. *Holbrook v. Foss*, xxvii. 441.

17. It is generally true, that an erroneous judgment is to be avoided only by a writ of error; but this rule does not apply to cases where a party has a right to impeach a judgment illegally rendered, and yet has no right to reverse it. *Caswell v. Caswell*, xxviii. 232.

18. In equity, to avoid a conveyance by a deceased debtor, the grantee may impeach the judgment, which is the foundation of the suit, if such judgment be unlawfully obtained; and this may be done by plea and proof. *Caswell v. Caswell*, xxviii. 232.

19. Where an action was intended to be carried by demurrer to the S. J. Court, and an erroneous judgment was entered in the District Court, for the plaintiff, by consent, when, upon the pleadings, which by agreement might be waived, the defendant was entitled to judgment; and the appeal was entered and continued, and then dismissed for want of a legal recognizance, and judgment was rendered in the District Court for the plaintiff, without any appearance for the defendant, or any notice to him, or any change in the pleadings: — *Held*, that such judgment might be impeached by one injuriously affected thereby, not a party or privy thereto. *Caswell v. Caswell*, xxviii. 232.

20. A judgment upon a report of referees, who have adjudicated matters legally submitted to them, is equally valid as when founded upon a verdict. *Pease v. Whitten*, xxxi. 117.

21. A judgment is a debt of a higher order than was the contract upon which it is founded. *Pike v. McDonald*, xxxii. 418. *Uran v. Houdlette*, xxxvi. 15.

22. A judgment against a trustee will not bar an action against him by the principal, unless a demand had been made within thirty days from the judgment, by an officer holding the execution. *Bachelder v. Merriman*, xxxiv. 69.

23. Neither will such judgment operate as such bar, unless the trustee

had delivered or accounted for the goods, effects and credits upon the judgment. *Bachelor v. Merriman*, xxxiv. 69.

24. Judgments of Courts, having competent jurisdiction, are presumed in law to have been rendered upon the appropriate preliminary proceedings. *Eldridge v. Preble*, xxxiv. 148.

25. A judgment is a sufficient foundation for a levy, although there may have been some error in the date of the writ, the service thereon, and the term of the Court at which the action should have been entered. *Woodman v. Smith*, xxxvii. 21.

26. Upon the overruling of a demurrer to a complaint or indictment for a misdemeanor, the judgment against the defendant is not a *respondeas ouster*, but is peremptory. *State v. Merrill*, xxxvii. 329.

27. A judgment in a writ of entry for the premises, and possession under it against the person apparently holding title, though he may have conveyed it by an unrecorded deed, but unknown to the levying creditor, is evidence of title against which such grantee can interpose no defence. *Spaulding v. Goodspeed*, xxxix. 564.

28. Nor can the claimants under such grantee set up any title anterior to the judgment, and which, if pleaded, might have defeated it. *Spaulding v. Goodspeed*, xxxix. 564.

#### IV. ACTIONS ON, AND SATISFACTION OF, JUDGMENTS.

29. Where the judgment of a court of limited and special jurisdiction is sought to be enforced, its organization is open to inquiry, and its jurisdiction must be established by the party seeking to enforce the judgment. *Crawford v. Howard*, xxx. 422.

30. In an action upon a judgment, defendant cannot prove that, prior to its rendition, a part of the claim upon which it was founded had been paid. *Bird v. Smith*, xxxiv. 63.

31. So, in an action upon a security given in satisfaction of a judgment. *Bird v. Smith*, xxxiv. 63.

32. Until the expiration of twenty years from the recovery of a judgment, there arises, from lapse of time, no degree of presumption that the judgment has been paid. *Thayer v. Mowry*, xxxvi. 287.

33. For an agreement by a judgment creditor that he would allow, upon the judgment, the amount which he had received towards the debt, prior to the judgment, such receipt of the amount is a sufficient consideration. *Thayer v. Mowry*, xxxvi. 287.

34. In a suit upon such judgment, if the receipt of the money and the agreement be proved, the jury may treat the amount received as a payment upon the judgment. *Thayer v. Mowry*, xxxvi. 287.

35. In such case, the defendant may introduce evidence of the plaintiff's agreement; of their dealings previous to the judgment; and of any facts which could justify the jury in finding that the money had been received by the plaintiff, together with the amount. And such evidence has no tendency to impeach the judgment. *Thayer v. Mowry*, xxxvi. 287.

36. After the lapse of twenty years from the rendition of a judgment, the law presumes it to be satisfied. *Jackson v. Nason*, xxxviii. 85.

37. If that presumption is attempted to be overcome by evidence of the continued insolvency of the judgment debtor, and it is proved that soon after its recovery he failed in business, no legal inference will arise that his insolvency continued afterwards. *Jackson v. Nason*, xxxviii. 85.

38. If the creditor in an execution would revive a judgment, once satisfied by a levy, it must be legally proved that the levy was invalid. *Jackson v. Nason*, xxxviii. 85.

39. For this purpose, office copies of deeds, purporting to show that the title of the land was not in the judgment debtor, at the time of the levy, are not admissible. *Jackson v. Nason*, xxxviii. 85.

40. An action upon a judgment may be maintained, although an *alias* execution was subsequently issued thereon, on which the debtor was arrested and committed. *Moor v. Towle*, xxxviii. 133.

41. In debt upon the judgment of a justice of the peace, whose commission had expired more than two years before this trial, if the minutes upon the justice's docket are such as to enable the Court to perceive that they would authorize an extended record, they will be sufficient. *Grosvenor v. Tarbox*, xxxix. 129.

See Costs, 31.

#### V. JUDGMENTS OF COURTS OF OTHER STATES.

42. If it appears, by the record of a judgment rendered in another State, that the Court had no jurisdiction of the parties, such judgment has no force or validity whatever, here. *Middlesex Bank v. Butman*, xxix. 19. *Long v. Hammond*, xl. 204.

43. No action can be maintained in this State, upon a judgment recovered in another State, against a defendant, of whose person the Courts of that State had no jurisdiction. *McVicker v. Beedy*, xxxi. 314.

44. The ownership of property, situated within a State, does not, of itself, give to the Courts of that State jurisdiction of the owner's person. *McVicker v. Beedy*, xxxi. 314.

45. The fact that a part of such judgment had been collected, under the process of the Court in that State, will not aid an action brought upon the judgment here. *McVicker v. Beedy*, xxxi. 314.

46. Where a person, residing in this State, obtains a discharge from all his debts, by a Court of Bankruptcy in another government, such discharge can have no effect upon a contract entered into, in such government. *Long v. Hammond*, xl. 204.

47. A judgment rendered in another State, upon a writ served upon a defendant personally in that jurisdiction, and in which he appeared and pleaded to the merits, is entitled to the same faith and credit as if rendered here; although, at the time of the service of the writ, on which there was no attachment, both parties were, and they still are citizens of this State. *Cleaves v. Lord*, xliii. 290.

See BANKRUPTCY, 19.  
FOREIGN LAWS.

## JURISDICTION.

1. To enable the Court to decide an action upon an agreed statement of facts, the statement must appear to have been made in a case legally before the Court. *Hatch v. Allen*, xxvii. 85.

2. The parties cannot present a case by agreement, in a manner not authorized by law. *Hatch v. Allen*, xxvii. 85.

3. If the Court, from which an action is appealed, has no jurisdiction of the action, the appellate Court can obtain none by virtue of the appeal. *Hatch v. Allen*, xxvii. 85.

4. The title to real estate cannot be considered as brought in question, under R. S. of 1841, c. 116, when it is not put in issue by the pleadings or brief statement, and cannot be affected by the judgment. *Hatch v. Allen*, xxvii. 85.

5. Courts of justice can give effect to Legislative enactments, only to the extent to which they may be made to operate by a fair and liberal construction of the language used. It is not their province to supply defective enactments, by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments. *Swift v. Luce*, xxvii. 285.

6. By R. S. of 1841, c. 156, § 7, it is an offence, punishable in this State, if a person, to whom property to be by him carried for hire and delivered in another State, shall fraudulently convert the same to his own use, before such delivery, whether the act of conversion be in this State or another. *State v. Haskell*, xxxiii. 127.

7. When, by a statute, the jurisdiction of an offence is given to a justice of the peace, or a police or municipal court, but is not declared to be exclusive, the District Court has concurrent jurisdiction of the same offence. *State v. Billington*, xxxiii. 146.

8. The Courts of a country or State have no jurisdiction beyond its sovereignty. *Lovejoy v. Albee*, xxxiii. 414.

9. Judgments, rendered by Courts not having jurisdiction, are void. *Lovejoy v. Albee*, xxxiii. 414.

10. When property of a person is within the State, he not being present, a judgment against him will be effectual only as a judgment *in rem*. *Lovejoy v. Albee*, xxxiii. 414.

11. No judgment can be rendered against one as trustee, either at common law, or under our statute, if neither he nor the principal defendant resides within the jurisdiction, and if no tangible property of such defendant has been found here. *Lovejoy v. Albee*, xxxiii. 414. *Smith v. Eaton*, xxxvi. 298.

12. Jurisdiction cannot be imparted to the Court by the consent of parties. *State v. Bonney*, xxxiv. 223.

13. There is no presumption in favor of the jurisdiction of a justice of the peace. *State v. Hartwell*, xxxv. 129. *Hersom's case*, xxxix. 476. *Lane v. Crosby*, xlii. 327. *Wat. I. Manuf'g Co. v. Goodwin*, xliii. 431.

14. The S. J. Court, at a term held for the transaction of criminal business, has no jurisdiction of processes under the Bastardy Act. *Mahoney v. Crowley*, xxxvi. 486.



15. The jurisdiction of the Court extends over offences committed within the territorial limits of the county, whether before or after its incorporation. *State v. Jackson*, XXXIX. 291.

16. The S. J. Court, by the Act of 1852, c. 241, while sitting as a Law Court, is not a court of original jurisdiction. *Baker v. Johnson*, XLI. 15.

17. The Court has no jurisdiction of a mere memorial, alleging that the acts of co-ordinate branches of the government are irregular, unlawful and unconstitutional, and praying judgment of the Court thereupon; especially when no process has been served upon any one adversely interested, and no department of the government, or officer thereof, has appeared voluntarily and claimed to be heard. *Davis, ex parte*, XLI. 38.

See ACTION, 36.

BANKRUPTCY, 20.

INSANE PERSONS, 3, 4.

## JURY.

1. A juror, belonging to the town, whose books of records were alleged to have been secreted by defendant, was rightfully excluded from the panel on the trial for the offence. *State v. Williams*, XXX. 484.

2. A jury has the right to decline the finding of any other than a general verdict. *Fuller v. Kennebec Mutual Ins. Co.*, XXXI. 325.

3. A person related to another by affinity in the fourth degree, according to the civil law, cannot act as a juror in a suit, to which such other person is a party, except by consent. *Hardy v. Sprowl*, XXXII. 310.

4. A juror, whose brother is joined in marriage with a sister of one of the parties, is not disqualified to sit in the trial. *Chase v. Jennings*, XXXVIII. 44.

5. In all challenges to the jury for cause, the ground of challenge must be distinctly stated and entered upon the record. *State v. Knight*, XLIII. 11.

6. The common law practice in England, in relation to triers in a challenge to the jury for favor, has been superseded by satisfactory provisions of statutes under the different forms of government in Massachusetts. *State v. Knight*, XLIII. 11.

7. Challenges of jurors are allowed in criminal as in civil causes, and for similar reasons; and the Court is the only tribunal which the statute has provided for their trial, whether they be principal challenges or challenges to the favor. *State v. Knight*, XLIII. 11.

## JUSTICE OF THE PEACE.

- I. JURISDICTION.
- II. MINISTERIAL ACTS.
- III. IN GENERAL.

## I. JURISDICTION.

- (a) IN PERSONAL MATTERS.
- (b) WHERE TITLE TO REAL ESTATE IS IN QUESTION.
- (c) IN CRIMINAL MATTERS.

(a) *In personal matters.*

1. A justice of the peace has no jurisdiction of an action, if he were once married to a sister of the plaintiff, whether, at the time of the suit, she were living or not; and whether the suit were for his own benefit, or for the benefit of others. *Spear v. Robinson*, xxix. 531.

2. There is no presumption in favor of the jurisdiction of a justice of the peace. *State v. Hartwell*, xxxv. 129. *Hersom's case*, xxxix. 476. *Lane v. Crosby*, xlii. 327. *Wat. I. Manuf'g Co. v. Goodwin*, xliii. 431.

3. Whether justices of the peace and quorum, living in another county than that in which they were appointed, may exercise jurisdiction under their commissions, before they have expired, *quere*. *Houghton v. Lyford*, xxxix. 267.

4. Jurisdiction of magistrates cannot be conferred by consent of parties. It is merely a statute regulation. *Call v. Mitchell*, xxxix. 465.

(b) *Where title to real estate is in question.*

5. The title to real estate cannot be brought in question, under R. S. of 1841, c. 116, §§ 1 and 3, when it is not put in issue by the pleadings or brief statement, and cannot be affected by the judgment. *Hatch v. Allen*, xxvii. 85.

6. In assumpsit to recover compensation for the use of certain real estate, brought before a justice of the peace, if the defendant pleads the general issue, and files a brief statement, in which he denies the plaintiff's title to the premises, and alleges that he occupied under one who had title, such brief statement does not, under the statute, authorize the removal of the action to the District Court, without any trial or judgment by the justice of the peace. *Hatch v. Allen*, xxvii. 85.

(c) *In criminal matters.*

7. In a mittimus, it is not necessary to copy the complaint, or to state the proofs before the justice. *Ricker, pet'r*, xxxii. 37.

8. A magistrate's warrant must show his jurisdiction to issue it. *Gurney v. Tufts*, xxxvii. 130. *Vinton v. Weaver*, xli. 430.

9. A magistrate has no authority to issue a warrant to search a dwelling-house, for intoxicating liquors, alleged to be kept for illegal sale, on the complaint of three persons competent to be witnesses, unless it shall first be shown to him, by the testimony of witnesses reduced to writing and verified by oath, that they have reasonable ground for believing that such liquors are there kept for illegal sale. *State v. Staples*, xxxvii. 228.

10. By R. S. of 1841, c. 170, justices of the peace are authorized to punish by fine, not exceeding ten dollars, persons convicted of certain offences, and to try all offences within their jurisdiction, and to sentence those convicted according to law; but are not authorized to imprison. *Hersom's case*, xxxix. 476.

11. The punishment for a violation of § 2, c. 166, of the Act of 1855, being by fine of twenty dollars, and imprisonment of the offender, puts the offence out of the jurisdiction of a justice of the peace, without some express provision giving them jurisdiction, which the Act does not contain. *Hersom's case*, xxxix. 476.

See WARRANT.

## II. MINISTERIAL ACTS.

12. A magistrate, in taking a deposition, acts in a ministerial and not in a judicial capacity. *Cooper v. Bakeman*, xxxiii. 376.

13. If, in the caption, he certify falsely, he is accountable to the party injured. *Cooper v. Bakeman*, xxxiii. 376.

14. In the renewal of on execution, a magistrate acts ministerially. *Jones v. Elliott*, xxxv. 137.

15. A justice of the peace may renew an execution at any time, within two years from the expiration of his commission, although, at the time of doing it, he may be rightfully exercising the duties of an executive officer. *Jones v. Elliott*, xxxv. 137.

16. A justice of the peace, for any act done in his judicial capacity, is not liable in a civil action; but, if he act corruptly in his ministerial duties, he is liable to the party injured. *Tyler v. Alford*, xxxviii. 530.

17. An arrest on an execution, issued upon a judgment lawfully rendered by a magistrate, will not support an action for assault and battery and false imprisonment, against the magistrate, by evidence that he refused to allow an appeal claimed from such judgment, when sufficient sureties were offered and his fees paid. *Tyler v. Alford*, xxxviii. 530.

18. A justice of the peace is not authorized by the statute to take depositions in cases where he is, or has been, counsel or attorney. *Cutler v. Maker*, xli. 594.

19. But such justice may issue notices to the adverse party, returnable before another magistrate. *Cutler v. Maker*, xli. 594.

## III. IN GENERAL.

20. A certified copy by a magistrate, of a record of a judgment rendered by him, is the proper evidence to support an action upon such judgment. *Wentworth v. Keazer*, xxx. 336. *English v. Sprague*, xxxiii. 440.

21. But defendant may prove that what purported to be a certified copy was not authentic. *Wentworth v. Keen*, xxx. 336.

22. One who has been a magistrate has no authority to certify copies, after two years from the expiration of his commission. *Wentworth v. Keazer*, xxx. 336.

23. Under R. S. of 1841, c. 116, § 14, a justice is authorized to grant one continuance, in a suit brought before another justice, either at the return day of the writ, or on a day to which the cause had been legally adjourned. *Tyler v. Beal*, xxxi. 336.

24. A magistrate's certificate, alleging what facts appear by the record, is not admissible. *English v. Sprague*, xxxiii. 440.

25. A second continuance for the same cause, under R. S. of 1841, c. 116, § 14, or a trial of an action after thirty days, by a justice other than the one before whom the writ is made returnable, is illegal; and the judgment rendered thereafter, invalid. *Call v. Mitchell*, xxxix. 465.

See INSANE PERSONS, 3, 4.

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## JUSTICE OF THE PEACE DE FACTO.

See DEED, 38, 39, 40.

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## LACHES.

No laches are imputable to a party who suffers a default in an action where a defence would be unavailing. *Roxbury v. Huston*, xxxix. 312.

See GUARANTY, 4.

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## LANDING.

1. A landing, though for the purpose of direct transit, is more than a high-way. The public have no right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit for property in its transit, against the will of the owner, although such user has been continued for more than twenty years. *State v. Wilson*, xlii. 9.

2. Such user affords no foundation for the presumption of a grant, nor evidence of a dedication. Prescription will give no right to the exclusive occupation of another's land, for such purpose, as it may give the traveler the right to pass over it without the power of halting thereon; and any such use of it, amounting to an invasion of the rights of the proprietor, would be similar to a trespass upon upland, and the remedy would be the same. *State v. Wilson*, xlii. 9.

## LANDLORD AND TENANT.

- I. WHAT CONSTITUTES THE RELATION.
- II. TENANCIES AT SUFFERANCE, AT WILL, AND BY CURTESY.
- III. RIGHTS AND REMEDIES.

## I. WHAT CONSTITUTES THE RELATION.

1. Where a person entered upon land by license of one of the owners in common, and erected and occupied a building upon it, he is considered as holding in submission to the title of such owner, until the contrary is proved. *Bucknam v. Bucknam*, xxx. 494.

2. Where the grantor of land remains in possession after the conveyance, a legal presumption arises that he is tenant to the grantee. *Larrabee v. Lumbert*, xxxiv. 79.

3. That presumption may be repelled by proof. *Larrabee v. Lumbert*, xxxiv. 79.

4. After notice to quit, the grantee may elect to treat the grantor, if in possession, as holding by wrong, and not as tenant. *Larrabee v. Lumbert*, xxxiv. 79.

5. Where one occupies and improves real estate which is manifestly beneficial, and a lease to such occupant for a nominal rent, from the owner, is found on record, in the absence of testimony, it is presumed the occupant holds under the lease. *Libbey v. Staples*, xxxix. 166.

## II. TENANCIES AT SUFFERANCE, AT WILL, AND BY CURTESY.

6. At common law, a holding over by the consent of parties was a renovation of the contract. *Kendall v. Moore*, xxx. 327.

7. But under R. S. of 1841, c. 91, § 30; c. 95, § 19, and c. 128, § 5, a tenant holding over by consent, after the expiration of the term, is considered a tenant at will only, and is entitled to notice. *Kendall v. Moore*, xxx. 327. *Young v. Young*, xxxvi. 133.

8. From the mere continuance of occupation by the lessee, after the expiration of a written lease, there arises no legal presumption of a tenancy at will. *Lithgow v. Moody*, xxxv. 214.

9. A conveyance of the estate by the landlord will not impair the right secured by the statute to a tenant at will. *Young v. Young*, xxxvi. 133.

10. An estate at will, under our statute, gives to the tenant rights for a period after notice, of equal validity with those under a written lease for a like period. *Young v. Young*, xxxvi. 133.

11. If a tenant continues in possession after the expiration of his lease, the *onus probandi* is upon him to show the acquiescence of the landlord. *Chesley v. Welch*, xxxvii. 106.

12. A tenant holding under a lease for a definite time, by a delay of a lessor to enter after its termination, may acquire the rights of a tenant at will, upon the presumption of the lessor's acquiescence. *Chesley v. Welch*, xxxvii. 106.

13. A seizin by a married woman in her own right, without a seizin in fact, will entitle her husband, at her death, to become tenant by curtesy. *Wass v. Bucknam*, xxxviii. 356.

### III. RIGHTS AND REMEDIES.

- (a) AGAINST EACH OTHER.
- (b) EMBLEMENTS.
- (c) NOTICE TO QUIT, AND DETERMINATION OF TENANCIES.
- (d) ACTION FOR USE AND OCCUPATION.

#### (a) *Against each other.*

14. The lessors of a farm, adjoining a river, have no right to the drift-wood which the lessee takes from the river, unless it is derived from the terms of the lease. *Dyer v. Haley*, xxix. 277.

15. Lessees for a time fixed, who hold over, are not liable for rent longer than for the time of their occupation. *Kendall v. Moore*, xxx. 327.

16. In a tenancy at sufferance, of a house and lot, the landlord is chargeable in trespass *quare clausum*, if he enter by force to the injury of the tenant or his family, even after two months verbal notice to quit. *Brock v. Berry*, xxxi. 293.

17. After notice to quit to a grantor, remaining in possession after a conveyance, the grantee may elect to treat the grantor as holding by wrong, and not as tenant; and the bringing of a writ of entry is such an election. *Larabee v. Lumbert*, xxxiv. 79.

18. Until a tenancy at will is terminated, trespass *quare clausum* cannot be maintained by the owner against the tenant. *Young v. Young*, xxxvi. 133.

19. The legal liability of a lessee, to pay rent to his lessor, continues until their relation of landlord and tenant ceases, notwithstanding notice by the landlord to the tenant that he was to pay the rent to a third party. *Fox v. Corey*, xli. 81.

20. Whether the provisions of the statute, 4th Anne, c. 16, by which a tenant, having notice of a conveyance of the premises to a third party, is liable to pay rent to the latter without attornment, have been adopted in this State, *quere*. *Fox v. Corey*, xli. 81.

21. Trespass on the case is maintainable by the owners of the fee, against a tenant at will, for acts prejudicial to the inheritance. *Files v. Magoon*, xli. 104.

#### (b) *Emblements.*

22. From a proviso in a lease, that the crops raised on the land shall be considered and remain the property of the lessor, till the rents should be paid, there arises no presumption that the rents were in fact paid by the crops. *Lithgow v. Moody*, xxxv. 214.

23. If the lessor enters immediately upon the termination of the lease, the lessee can have no rights to the emblements, though he still remains on the premises. *Chesley v. Welch*, xxxvii. 106.

(c) *Notice to quit, and determination of tenancies.*

24. Upon neglect to pay the rent due on a lease at will, thirty days notice, given in writing, by the landlord to the tenant, will determine the lease. *Smith v. Rowe*, xxxi. 212. *Dutton v. Colby*, xxxv. 505.

25. Until the end of that time, the tenant's possession is lawful, and the lease is not determined. *Smith v. Rowe*, xxxi. 212.

26. The thirty days notice in writing, upon which the process of forcible entry and detainer may be maintained, cannot be given until the tenancy is determined. *Smith v. Rowe*, xxxi. 212. *Dutton v. Colby*, xxxv. 505.

27. Such notice must be distinct from, and subsequent to, that by which the tenancy is to be determined. *Smith v. Rowe*, xxxi. 212.

28. After the expiration of a written lease, no notice to the tenant is necessary for the purpose of terminating the tenancy. *Preble v. Hay*, xxxii. 456. *Lithgow v. Moody*, xxxv. 214.

29. In a tenancy at will, a written notice to the tenant, to remove the buildings which he had erected, and to surrender the land to the landlord, will operate as a notice to terminate the tenancy. *Preble v. Hay*, xxxii. 456.

30. No act upon the part of the lessor is necessary to be done, to terminate a written lease for a specified time. *Lithgow v. Moody*, xxxv. 214.

31. The lessee of a farm, by parol, where the rent is payable yearly, must have three months notice, to determine his tenancy. *Young v. Young*, xxxvi. 133.

32. A conveyance of the estate, by the landlord, will not impair the right thus secured by the statute to the tenant. *Young v. Young*, xxxvi. 133.

33. Nor will the commission of waste terminate his tenancy. *Young v. Young*, xxxvi. 133.

34. An estate at will, under the statutes of this State, gives to the tenant rights, for a period after a written notice to quit, of equal validity with those acquired under a written lease for a like period. *Young v. Young*, xxxvi. 133.

(d) *Action for use and occupation.*

35. Where a creditor, holding land by levy of an execution, subject to the debtor's right of redemption, has leased the same, the debtor, after having redeemed, cannot recover of the lessee for the use and occupation prior to the redemption. *Dakin v. Goddard*, xxxii. 138.

36. Where the grantor of land remains in possession after the conveyance, such a presumption arises that he is tenant to the grantee, as, if uncontrolled, will support assumpsit for use and occupation. *Larrabee v. Lumbert*, xxxiv. 79.

37. But the bringing of a writ of entry, with possession thereby obtained, precludes a recovery for use and occupation. *Larrabee v. Lumbert*, xxxiv. 79.

38. To maintain assumpsit for use and occupation, the relation of landlord and tenant must subsist between the parties, founded on an agreement, express or implied. *Larrabee v. Lumbert*, xxxiv. 79. *Rogers v. Libbey*, xxxv. 200. *Roxbury v. Huston*, xxxix. 312. *Fox v. Corey*, xli. 81.

39. The tenant, having entered into possession of premises under one who disseized the true owner, is not liable to the latter in an action for use and

occupation, (though he may have promised by parol to pay the rent,) unless an entry has been made to purge the disseizin. *Roxbury v. Huston*, xxxix. 312.

See ACTION, 7.

ASSUMPSIT, 16.

## LANDS RESERVED FOR PUBLIC USES.

1. A resolve of the Legislature, authorizing the assessors of a plantation, in their own names and for the use of schools, to recover the value of timber and grass wrongfully taken from lands reserved for public uses, is not a grant of the avails. *Dudley v. Green*, xxxv. 14.

2. Such a resolve is merely an appointment of agents for the public. Such agency may be lawfully revoked, at any time, by a repeal of the resolve. *Dudley v. Green*, xxxv. 14.

3. The Act of 1845, authorizing County Commissioners to grant permits for the cutting of timber upon the public lots, was repealed in 1848, which terminated the Commissioner's authority. *Small v. Small*, xxxv. 400.

4. Such permits could operate only for one year. Hence a permit for cutting all the timber upon a public lot, though to be cut in such quantities yearly as the Act allowed, was held to be inoperative at the end of one year, and to furnish no protection to the purchaser to cut after that time. *Small v. Small*, xxxv. 400.

## LARCENY.

See INDICTMENT, 56, 57.

## LAW AND FACT.

- I. WHAT ARE QUESTIONS OF LAW.
- II. WHAT ARE QUESTIONS OF FACT.

### I. WHAT ARE QUESTIONS OF LAW.

1. In an action to recover damages for a malicious prosecution, the question of probable cause, upon established facts, is a question of law. *Stevens v. Fassett*, xxvii. 266. *Marks v. Gray*, xlii. 86.

2. The jury are to decide matters of fact, and those only. And when the facts are found by uncontradicted testimony, or by agreement, or by special verdict, their legal effect is matter of law. *Todd v. Whitney*, xxvii. 480.



3. When the intention of the parties is clearly and fully disclosed, neither the Court nor jury can disregard them, and infer and substitute other and different intentions. *Todd v. Whitney*, xxvii. 480.

4. When a usage, which may affect the rights of the parties, is presented by the testimony, it becomes the duty of the Court to determine whether, if proved to the satisfaction of the jury, it is reasonable and operative. *Codman v. Armstrong*, xxviii. 91.

5. It is the duty of the Court to define the meaning of words used in written contracts. *Herbert v. Ford*, xxxiii. 90. *Brown v. Orland*, xxxvi. 376. *Randall v. Thornton*, xliii. 226.

6. Where a case is submitted upon a statement of facts, and the statement shows that an act was done either "feloniously or fraudulently," the Court are not at liberty to infer that the act was felonious, but will consider it as merely fraudulent. *Ditson v. Randall*, xxxiii. 202.

7. Where evidence is introduced, without objection, as to the terms of a vote passed by a proprietary, and no question is raised concerning them, the Court may instruct the jury as to the effect of such vote. *Yeaton v. Yeaton*, xxxvi. 248.

8. Whether a party is entitled to damages for the loss of a contract, recited in the one broken, is a question of law. *Bridges v. Stickney*, xxxviii. 361.

9. A contract in writing is to be construed by the Court, and not by the jury. *Randall v. Thornton*, xliii. 226.

10. The Court will not determine the truth or absurdity of facts which are the result of scientific knowledge and experience, testified to by experts. If untrue, their fallacy is to be shown by evidence of other experts. *State v. Knight*, xliii. 11.

## II. WHAT ARE QUESTIONS OF FACT.

11. The Court cannot imply a promise, so as to take the contract from the statute of limitations, as an inference of law, from the payment of a part of the debt; but the evidence should be submitted to the jury with proper instructions, to enable them to do it. *White v. Jordan*, xxvii. 370.

12. Where the intention of parties is not clearly or necessarily disclosed by the facts, it is a matter of fact for the jury, in order that the Court may determine the legal effect of the facts coupled with the intention. *Todd v. Whitney*, xxvii. 480.

13. The law having been stated to the jury, they may judge, in all cases, of the reasonableness of charges, made in an account. When an agreed price is proved, or a usage which might affect it, or evidence from which an agreement might be inferred, they cannot judge of the reasonableness of the charges, irrespective of such agreement or usage. *Codman v. Armstrong*, xxviii. 91.

14. Whether the testimony of certain witnesses, if believed, would prove that certain property had been delivered up to the plaintiff prior to the acts complained of, or whether it still remained in the possession, and at the risk of the defendant, is a matter of fact. *Alley v. Blen*, xxviii. 308.

15. Not only the words, but the meaning of words, used orally between parties, are matters of fact. *Copeland v. Hall*, xxix. 93. *Herbert v. Ford*, xxxiii. 90. *Brown v. Orland*, xxxvi. 376. *Houghton v. Houghton*, xxxvii. 72. CUTTING, J., dissenting.

16. In actions of libel, the question of malice is a question of fact. *Lancely v. Bryant*, xxx. 466.

17. Where one witness testifies positively to a fact, and another witness of equal credibility contradicts it, and testifies to facts inconsistent with its truth; whether the main fact be proved or not is a question for the jury. *Johnson v. Whidden*, xxxii. 230. *Sweetser v. Lowell*, xxxiii. 446.

18. Whether a master of a vessel exercises reason, skill, prudence and care to give all others their just rights in navigating a river, is a question of fact. *Knowlton v. Sandford*, xxxii. 148.

19. So, whether a certain degree of force was necessary to defend one's property, and therefore justifiable. *State v. Clements*, xxxii. 279.

20. An insurance was effected upon a mill for the manufacture of starch, upon a representation that the business had been completed for the season. In fact, a quantity of starch was then lodged in the drying room; and, for the purpose of expelling the moisture from it, a fire was made in the mill, after the policy had been effected:—*Held*, that whether such drying was, or was not part of the manufacturing process; and, therefore, whether the representation was, or was not true, that the business of manufacturing was completed when the insurance was effected, are matters of fact. *Percival v. Maine M. Ins. Co.*, xxxiii. 242.

21. So what, under the circumstances, would be a suitable watch, when an insurance was effected upon a building, upon a warranty that a "suitable watch" would be kept. *Percival v. Maine M. M. Ins. Co.*, xxxiii. 242.

22. So, also, whether the article sold, was or was not of the prohibited class, in a prosecution for the unlawful sale of spirituous or intoxicating liquors. *State v. Wall*, xxxiv. 165.

23. So, whether the corporation were the party to a judgment, recovered under a name variant from their corporate name; and upon which parol evidence is admissible. *Wilton Manuf'g Co. v. Butler*, xxxiv. 431.

24. So, whether the user of a road, whereby it has become a public way, extended to the whole space between the fences, or only to the wrought part between the gutters. *Lawrence v. Mt. Vernon*, xxxv. 100.

25. So, as to what, in truth, were the terms of a vote passed by a proprietary, where evidence to that point is introduced without objection. *Yeaton v. Yeaton*, xxxvi. 248.

26. And, as to which class of wood, whether hard or soft, a particular species belongs. *Darling v. Dodge*, xxxvi. 370.

27. And, whether the master, under all the circumstances, exercised a sound judgment and discretion, in selling the cargo of a vessel. *Pike v. Balch*, xxxviii. 302.

28. And, whether alleged obstructions or defects in a highway render it unsafe, although not in the traveled part of it. And whether, in some particular localities, the highway should not be made safe and convenient for its entire width. *Bryant v. Biddeford*, xxxix. 193.

29. And, the construction of a written contract, where the contents of it is proved by parol, without any copy, the original having been lost. *Moore v. Holland*, xxxix. 307.

30. And, whether a note has been altered or not, since it passed out of the hands of the promisor. *Shapleigh v. Abbott*, xli. 173.

31. And, whether a delivery of a part was for the whole. *Pratt v. Chase*, xli. 269.

32. The credit of a witness is a matter entirely for a jury, as to which no invariable rules of law can be given. The maxim, "*falsus in uno, falsus in omnibus*," is qualified by circumstances. *Parsons v. Huff*, *XLI.* 410. *Merrill v. Whitefield*, *XLI.* 414.

33. And, whether, under the Act of 1851, c. 211, § 16, spirituous or intoxicating liquors are so sold as to be liable to seizure or forfeiture, or are intended for sale in violation of law. *Dolan v. Buzzell*, *XLI.* 473.

34. The report of commissioners, in a process of partition, contained the following clause, descriptive of a portion of the estate: "Also the water privilege now occupied by the saw-mill called Franklin:"—*Held*, that the extent of that privilege was matter of fact for the jury. *Munroe v. Gates*, *XLII.* 178.

35. So, whether a stream is capable of being used as a passage way for the purposes of commerce. *Treat v. Lord*, *XLII.* 552.

## LEASE.

1. A lease for a stipulated time, covenanting that the lessee shall pay the rent and peaceably give up the possession at the end of the term, "and for such further time as the lessee shall hold the same," is a security both for the surrender of the estate and for rent during the occupation. *Kendall v. Moore*, *XXX.* 327.

2. Under the lease of a farm and stock of cattle, with stipulation that the rent should consist of a specified part of the products, except the hay, "all of which was to be used on the farm for the stock:"—*Held*, that the tenant had no attachable interest in the hay. *Potter v. Cunningham*, *XXXIV.* 192.

3. The lessee, who stipulates that one half of the hay shall be consumed on the farm, and the other half divided between the lessor and lessee, has the entire property, until division be made. *Symonds v. Hall*, *XXXVII.* 354.

4. Such division vests the portions divided, separately, in the lessor and lessee; but the undivided half to be consumed on the farm remains the property of the lessee, without a delivery be made to the lessor. *Symonds v. Hall*, *XXXVII.* 354.

5. If the owner of land execute a lease of it for a series of years and die, the accruing rents, after his death, descend to his heirs. *Stinson v. Stinson*, *XXXVIII.* 593.

6. N. let certain land and buildings to F., for six years, and gave him a permit to detach some of the buildings and erect others, and to take away such new erections or sell them upon the premises, at the determination of the lease, after the buildings had been restored to their original position, and not before. The change was made and a new building erected. After such erection, and before the expiration of the lease, it was surrendered and accepted. After such surrender, the lessee sold the new building to the plaintiff, who, at a place distant from the premises, and before the six years had expired, notified the lessor that he wished to take off the building, and was ready to comply with all the conditions of the permit. The lessor claimed the building as his own, and said he should hold it by force, if there should be any attempt to remove it. In trover, for the building:—*Held*,—

1st. That, for the purpose of complying with the conditions of the permit, no demand by the lessee was necessary, and his rights could not be changed or enlarged by making such demand ; —

2d. That the obligations of the parties under the permit were not mutual and dependent, but to entitle him to the building, all that was to be done, was to be done by the lessee ; —

3d. That, if the lessee was rightfully on the premises at the proper time, and in the act of performing or attempting to perform his stipulations mentioned in the permit, and had then been refused, or resisted, it might have been evidence of a conversion ; but —

4th. The claim to the building, under the circumstances and nature of the demand, was no evidence of conversion. The lessee was bound to restore the buildings to their original position, before he could take them away. *Parker v. Goddard*, xxxix. 144.

7. The owner of real estate may transfer his land by a lease, executed by him unconditionally, and the lease will be effectual, although it contains covenants intended for the execution of the lessee by signing and sealing, but was not in fact signed and sealed by the latter. The lessor may waive the covenants on the part of the lessee ; and the putting them on record by the lessor is a waiver. *Libbey v. Staples*, xxxix. 166.

8. A levy upon property leased, for the debts of the lessor, contracted prior to the lease, without the agency of the lessee, or any agreement on his part to pay such debts, will excuse the latter from performance of his covenants to manage such property, afterwards, so far as the omission was the consequence of the property passing from his control. *Great P. Mining Co. v. Buzzell*, xxxix. 173.

9. The lessee of real property, when establishing title, may use as evidence an office copy of the recorded title deed of his lessor. *Trask v. Ford*, xxxix. 437.

10. A lease to one during his life, with the privilege of furnishing his daughters a home, so long as they remain unmarried, gives to them no rights as tenants of the freehold. *Quimby v. Dill*, xl. 528.

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## LEGACY.

See DEVISE AND LEGACY.

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## LEVY ON REAL ESTATE.

See EXECUTION, 7 — 102.

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## LIBEL FOR FORFEITURE.

See LOGS. SHIPPING, 49, 50.

## LIBEL AND SLANDER.

- I. THE CRIMINAL OFFENCE.
- II. THE CIVIL ACTION.

## I. THE CRIMINAL OFFENCE.

1. In an indictment for a libel, an allegation that the defendant sent the same to several specified persons, and thereby published the same, is a sufficient averment of publication. *State v. Barnes*, xxxii. 530.

2. Such an allegation is not a mere allegation of law. It is sustained by proof that the defendant sent the libel to one only of the persons specified. *State v. Barnes*, xxxii. 530.

3. An allegation, that the defendant wrote and printed a libel, may be treated as an allegation that he wrote and printed a false and defamatory publication. The whole words need not be set out. *State v. Barnes*, xxxii. 530.

4. In such indictment, it is not necessary to set out the residence and addition of the person libeled. *State v. Barnes*, xxxii. 530.

5. Where several modes of publication are mentioned, it is not fatal that they are alleged in the disjunctive. *State v. Barnes*, xxxii. 530.

6. A former conviction, for the same offence, cannot avail in arrest of judgment. It should be specially pleaded. *State v. Barnes*, xxxii. 530.

## II. THE CIVIL ACTION.

- (a) WHAT IS LIBELLOUS, OR ACTIONABLE.
- (b) WHAT MAY BE SHOWN IN JUSTIFICATION OR DEFENCE.
- (c) PLEADINGS.
- (d) GENERALLY.

(a) *What is libellous, or actionable.*

7. The repetition of slanderous words, spoken by another at the request of the plaintiff, will not sustain an action. *Haynes v. Leland*, xxix. 233.

8. Words spoken of another, in themselves actionable, but under such circumstances as would not lead the persons present to believe they were spoken as truth, cannot support an action. *WHITMAN*, C. J., dissenting. *Haynes v. Haynes*, xxix. 247.

9. Words, not in themselves actionable, may be the foundation of an action, by reason of some special damage, occasioned by them. *Barnes v. Trundy*, xxxi. 321.

10. To charge one with drunkenness is not of itself actionable; for the law does not inflict upon that offence an infamous punishment. *Buck v. Hersey*, xxxi. 558.

11. A witness, testifying in the regular course of legal proceedings, and under the direction of the Court, is not liable in an action of slander for the answers he may make to questions put to him by the Court or counsel, provided such answers are pertinent and responsive to the questions. *Barnes v. McCrate*, xxxii. 442.

12. Words, imputing the crime of perjury, are actionable in themselves. *Newbit v. Statuck*, xxxv. 315.

13. To assert that A. B. "committed the crime, or he would not have done that other act," is a charge that A. B. committed the crime. *True v. Plumley*, xxxvi. 466.

14. A charge that a married female is a "bad woman, and has dealings with other men besides her husband, and is not very particular with whom," does not amount to the charge that she "is a whore." *True v. Plumley*, xxxvi. 466.

(b) *What may be shown in justification, or defence.*

15. It is a good defence, that the words spoken were but the repetition of what was uttered by some other person, whose name was given at the time, unless it be proved that the repetition was malicious. *Whitman, C. J.*, dissenting. *Haynes v. Leland*, xxix. 233.

16. Where one justifies, that the words were but the repetition of what was uttered by another, whose name was given at the time, the *onus* is upon the defendant, whether the defence be presented under the general issue, or by a special plea. *Haynes v. Leland*, xxix. 233.

17. For words charging the crime of perjury, a justification by the defendant, that the charge was true, can be established only by evidence as strong as would have been necessary to convict the plaintiff of perjury. *Newbit v. Statuck*, xxxv. 315.

18. In such a suit, therefore, the testimony which the plaintiff gave upon the previous trial is to be considered by the jury, in connection with the other evidence in the case. *Newbit v. Statuck*, xxxv. 315.

19. An unlawful intermeddling with the defendant, or an unlawful attempt to search his person, will not authorize him to suppose such person may have taken his money, or excuse him for uttering such a charge. *Kent v. Bonzey*, xxxviii. 435.

20. Where it is shown that the words were spoken as privileged communications, so that there was no legal malice, it is a full justification. *Jellison v. Goodwin*, xliii. 287.

(c) *Pleadings.*

21. The defendant cannot give the truth in evidence, under the general issue, either as a defence or in mitigation. Neither can he make a defence under a brief statement, which was inadmissible under a special plea. *Taylor v. Robinson*, xxix. 323.

22. Where the defendant uttered actionable words without a lawful object, and there are no pleadings under which their truth may be given in evidence, he cannot show the misconduct of the plaintiff to rebut the presumption of malice; nor, unless the misconduct gave rise to the charge, and led the defendant to believe him guilty, could it be given in evidence in mitigation. *Taylor v. Robinson*, xxix. 323.

23. No action can be maintained for words not in themselves actionable, unless the declaration contain a distinct averment that they were spoken of and concerning the plaintiff, and of and concerning his occupation. *Barnes v. Trundy*, xxxi. 321.

24. So, when such words become actionable by reason of some special damage occasioned by them, such damage must be specially alleged and proved. *Barnes v. Trundy*, xxxi. 321. *Buck v. Hersey*, xxxi. 558.

25. A count, setting forth that the defendant had charged the plaintiff with the commission of a crime, by its general designation, is sustainable, though specially demurred to. *True v. Plumley*, xxxvi. 466.

26. Under such general count, the Court, on motion, may order a specification of the words which the plaintiff proposes to prove. *True v. Plumley*, xxxvi. 466.

27. The time when the words were uttered may be alleged with a *continuando*. *Burbank v. Horn*, xxxix. 233.

28. And the place, when alleged with a *videlicet*, is sufficient; and its omission would be only a fault in form. *Burbank v. Horn*, xxxix. 233.

29. The allegation that the slander was uttered in the presence and hearing of divers persons, or in the hearing of certain persons, (by name,) sufficiently sets forth its publication. *Burbank v. Horn*, xxxix. 233.

30. To charge a person with having "stolen boards," without any qualification, implies the crime of larceny, and no *innuendo* is necessary to explain its meaning. *Burbank v. Horn*, xxxix. 233.

31. When the libel or slander does not affect the plaintiff's moral character, but merely imputes insolvency or incapacity in the way of his trade, &c., the inducement of good character is inapplicable, and the declaration should commence with an inducement respecting his trade, &c. *Burbank v. Horn*, xxxix. 233.

32. When the slander is *prima facie* actionable, a declaration stating the defendant's malicious intent, and the slander concerning the plaintiff, is sufficient without any prefatory inducement. *Burbank v. Horn*, xxxix. 233.

#### (d) Generally.

33. In actions of libel, the question of malice is to be determined by the jury. *Lancey v. Bryant*, xxx. 466.

34. In an action against the editor of a newspaper, for a libellous publication, it is admissible for the plaintiff to show articles in subsequent numbers of the same paper, for the purpose of proving that the plaintiff was the person intended to be defamed. *White v. Sayward*, xxxiii. 322.

35. Testimony of witnesses is not receivable to show that, on reading the libellous article, they considered the plaintiff as the person intended to be defamed. *White v. Sayward*, xxxiii. 322.

36. From words, in themselves actionable, the law implies malice, and that some damage arises therefrom. *True v. Plumley*, xxxvi. 466. *Jellison v. Goodwin*, xliii. 287.

37. In addition to the implication of malice, a plaintiff may prove express malice, for the purpose of increasing the amount of damages. *True v. Plumley*, xxxvi. 466. *Jellison v. Goodwin*, xliii. 287.

38. For this purpose, he may prove that the defendant repeated the slander, after action brought. The repetition is not to be viewed as a substantive ground of recovery; but only to illustrate the motive of the former speaking. *True v. Plumley*, xxxvi. 466.

39. In a subsequent suit for such repetition, it is no defence that the repe-

tition was proved in the former suit, if it was so done for the sole purpose of showing malice in the original speaking. *True v. Plumley*, xxxvi. 466.

40. One count charged a married female with the crime of adultery, and another that she was a whore:—*Held*, that proof of the adultery would defeat a recovery upon the first count, and would mitigate, but not defeat, a recovery upon the other. *True v. Plumley*, xxxvi. 466.

41. In an action of slander, it is indispensable that the Judge present to the jury the rule of the law by which their assessment of damage should be made. *True v. Plumley*, xxxvi. 466.

42. And it is proper that the jury, in assessing the damage, should regard the probable future, as well as the actual past. *True v. Plumley*, xxxvi. 466.

43. In order that a recantation of the slanderous charge may be admissible in mitigation, it should be made in public, or in a mode to qualify the slander; or it should be made known to the party defamed, or to those who had been apprized of it. A retraction in the defendant's family merely would not avail him. *Kent v. Bonzey*, xxxviii. 435.

44. In slander, malice in fact implies a desire and intention to injure; but malice in law is not necessarily inconsistent with an honest or even a laudable purpose. *Jellison v. Goodwin*, xliii. 287.

45. Whether, upon the evidence, legal malice exists, is a question of law. *Jellison v. Goodwin*, xliii. 287.

## LICENSE.

1. A person who rightfully obtained a license to peddle is not liable to a penalty for not having one, although the County Commissioners had omitted to complete their records concerning it. *Foster v. Dow*, xxix. 442.

2. Unexpired licenses, under an Act which is repealed, are not annulled by the repeal, when in conformity with existing laws. *Foster v. Dow*, xxix. 442.

## LIENS.

- I. LIENS GENERALLY, AND THE MODE OF SECURING THEM.
- II. WAIVER OR EXTINGUISHMENT OF LIENS.

### I. LIENS GENERALLY.

1. The lien preserved by the Bankrupt Act of 1841 cannot exist after the debt, judgment, or other instrument, by which it was upheld, has been discharged. *Howe v. Handley*, xxviii. 241.

2. But where the lien, by virtue of an attachment of chattels, is discharged by proceedings in bankruptcy, during the pendency of an action of replevin



of the property attached, the creditor, by R. S. of 1841, c. 130, § 14, is entitled to receive, from the officer, interest at the rate of twelve per cent. per annum, on the value of the property, for so long a time as the service of his execution was delayed; to be returned for his own use, and not applied to the discharge of his judgment. *Howe v. Handley*, xxviii. 241.

3. Any person entitled to a lien upon a house, building or land, under R. S. of 1841, c. 125, § 37, is not entitled to a preference over the general creditors, when the debtor has deceased and his estate has been rendered insolvent within one year from the time of granting administration. *Wells, J.*, dissenting. *Severance v. Hammatt*, xxviii. 511.

4. The English doctrine of a lien upon an estate, for the payment of the purchase money, has never been admitted in this State: *Philbrook v. Delano*, xxix. 410.

5. When one of the proprietors in common of land has redeemed his own part, and also the part of another co-tenant, from a sale for taxes, and taken the purchaser's release thereof, such redemption transfers to him a lien thereon for a reimbursement, though it will give him no right of action to enforce it. *Watkins v. Eaton*, xxx. 529.

6. The statute invalidating unrecorded mortgages of personal property does not extend to liens. *Sawyer v. Fisher*, xxxii. 28.

7. Where the common law itself raises a lien, the possession must be continued. *Sawyer v. Fisher*, xxxii. 28.

8. Liens may be created by contract; and the mode, in which it shall be effectuated, continued or rescinded. *Sawyer v. Fisher*, xxxii. 28.

9. If it appear in a written contract that the parties intended to establish a lien, that intent must prevail, unless in conflict with the rules of law. *Sawyer v. Fisher*, xxxii. 28.

10. When it is stipulated, in the contract of sale of personal property, that the vendor shall retain a lien until payment, no rule of law conflicts with it. *Sawyer v. Fisher*, xxxii. 28.

11. A stove, with its funnel, cannot be considered as materials for the repair of a building, within the meaning of the statutes of lien. *Lambard v. Pike*, xxxiii. 141.

12. The lien, created by an attachment of real estate, is not limited to the amount which the officer was commanded, in the writ, to attach, but is commensurate with the judgment and costs of the levy. *Searle v. Preston*, xxxiii. 214.

13. A lien, reserved in a grant of land, upon the lumber which the grantee may take therefrom, is postponed to the lien given by the Act of 1848 to laborers. *Spoofford v. True*, xxxiii. 283.

14. When a grant of land, upon a condition subsequent, authorizes the grantee to take lumber therefrom, subject to lien for the purchase money, and several distinct quantities or lots of lumber are cut and driven to the boom by the grantee, (the persons employed in getting one of the lots having no connection with those who get another of the lots,) the lien of each laborer is upon the lot upon which he worked. *Spoofford v. True*, xxxiii. 283.

15. But, if, by the negligence or carelessness of the grantee in such deed, such several lots of lumber become intermixed, so that the respective lots upon which the several laborers worked cannot be distinguished, their respective liens are upon the whole mass. *Spoofford v. True*, xxxiii. 283.

16. In actions by the laborers to establish their lien claims, such an intermixture, if it occurred without their fault, is evidence of negligence or carelessness in the grantee, unless it was produced by some fraud or accident. *Spofford v. True*, xxxiii. 283.

17. So far as relates to the lien claims of the laborers, the grantee in the deed is to be treated as the agent of the grantors, and they are responsible for the consequences of his negligence or carelessness. *Spofford v. True*, xxxiii. 283.

18. The general rule, that titles and interests in real estate are to appear of record, has been controlled, to some extent, by the statute of liens. Contracts for labor or materials, and the furnishing the same under that statute, are proveable by parol. *Parsons v. Copeland*, xxxiii. 370.

19. Generally, it is only by the act of the owner, that a contract-lien upon property can be created. That rule was changed by the Act of 1848, creating a lien in behalf of laborers upon logs, &c. *Doe v. Monson*, xxxiii. 430.

20. An owner of logs employed a contractor to drive them at a stipulated price per thousand feet. The contractor employed assistants:—*Held*, that the assistants acquired a lien upon the logs. *Doe v. Monson*, xxxiii. 430.

21. Such owner, being summoned as trustee of the contractor, was allowed to discharge the laborers' liens out of the stipulated price. *Doe v. Monson*, xxxiii. 430.

22. When, in the same stream, there are logs of different owners, and each owner has employed sufficient laborers to drive his own logs, the lien of such laborers is solely upon the logs they were employed to drive; although the logs, being intermixed, are driven collectively by all the laborers of all the owners. *Doe v. Monson*, xxxiii. 430. *Hamilton v. Buck*, xxxvi. 536. *Doyle v. True*, xxxvi. 542.

23. The lien of a common carrier, for the freight of goods, transported by sea from a port of one nation to that of another, does not authorize him, of itself, to sell the goods for the payment of the freight. The usual remedy is by a libel. *Sullivan v. Park*, xxxiii. 438.

24. A mechanic employed to work upon a vessel, not by the owner, but by a contractor for a specified price, cannot enforce a lien upon the vessel by an action against the owner; but if he have such a lien, his remedy is by attaching the vessel, in a suit against his employer. *Ames v. Swett*, xxxiii. 479. *Atwood v. Williams*, xl. 409.

25. The Act of 1850, c. 159, enlarging liens upon buildings, was prospective only, and cannot aid a plaintiff, who, prior to its enactment, had attached to secure his lien. *Kendall v. Folsom*, xxxiv. 198.

26. A part owner of a vessel, who pays money to discharge liens for the expenses of building her, has no right to contribution from the other part owners, if the liens arose wholly from the delinquency of his vendor to pay his proportion of the building expenses. *Reed v. Bachelder*, xxxiv. 205.

27. The "personal" service embraces the time during which the laborer is detained at the employer's request, while the business is getting into a condition for the labor to be resumed. *McCrillis v. Wilson*, xxxiv. 286.

28. Where laborers, in separate crews and in separate places, work for the same employer in cutting and hauling lumber in the woods: *it seems*, that each one of them has a lien on any pieces of the lumber when at the place of manufacture, though without showing that he, or the crew with which he labored, worked upon such pieces. *McCrillis v. Wilson*, xxxiv. 286.

29. A commission merchant, who has sold part of the goods left with him for sale, has a lien upon the residue for his commissions and for freight paid and other advances. *Sewall v. Nichols*, xxxiv. 582.

30. To secure his lien, he may maintain replevin for the goods, even against an officer who has attached them on a precept against the owner. *Sewall v. Nichols*, xxxiv. 582.

31. His consent to become the keeper of the goods for the attaching officer does not defeat his right to maintain such action. *Sewall v. Nichols*, xxxiv. 582.

32. Any owner, who is compelled, by such an "intermixture" of logs as is contemplated under R. S. of 1841, c. 67, § 9, to drive the logs of other persons as well as his own, is bound, in selecting the time for driving, and in all other particulars, in which the rights of such others are involved, to exercise good faith, sound discretion and prudent management. *Foster v. Cushing*, xxxv. 60.

33. Then, there arises to him a claim to recover of the others a reasonable compensation; and it is no defence, that they had formed the purpose, and made ample provision to drive their own logs. *Foster v. Cushing*, xxxv. 60.

34. The statute, giving to laborers a lien upon lumber, extends only to the security of payment for their "personal services," and does not include the use of teams and their needful apparatus. *Coburn v. Kerswell*, xxxv. 126.

35. The lien on lumber does not extend to the hire of teams, though employed upon the same lumber. *McCrillis v. Wilson*, xxxiv. 286. *Coburn v. Kerswell*, xxxv. 126.

36. The law furnishes to the keeper of a livery stable no lien for the boarding or doctoring of horses at his stable. *Miller v. Marston*, xxxv. 153. *Vide LIEN*, 56.

37. By R. S. of 1841, c. 125, § 37, lien for erecting or repairing buildings extended only to contracts made by the owners or mortgagers of land, or by persons who had contracted with them. Hence, an obligee in a bond, for conveyance of the land, cannot subject it to a lien for such a cause. *Johnson v. Pike*, xxxv. 291.

38. The owner of land may expose it to a lien-claim, in favor of a person who may make erections thereon, pursuant to a sub-contract between himself and the principal contractor, whom the owner had employed to do the work. *Johnson v. Pike*, xxxv. 291.

39. In such case, the sub-contractor may perfect his lien by levy under the judgment, which he may have recovered against the principal contractor. *Johnson v. Pike*, xxxv. 291.

40. In a subsequent suit, involving title to the land, such owner is not a party or privy to that judgment, and is not estopped by it, or by any allegations in the writ upon which it was obtained, to show that no lien right had existed. *Johnson v. Pike*, xxxv. 291.

41. The lien under R. S. of 1841, c. 125, § 37, gives no protection to one who builds for himself, under a verbal arrangement that he should purchase the land at an agreed price. *Gray v. Carleton*, xxxv. 481.

42. The amendatory Act of 1850 extended to suits pending at the time of its enactment. *Gray v. Carleton*, xxxv. 481.

43. A guardian has no lien upon a judgment, recovered in the name of his ward, for advances made in its recovery. *Lang v. Whitney*, xxxvi. 155.

44. A party, who, at the request of the debtor, advances money to pay a third person his lien-claim for services, in building a vessel, does not thereby acquire a right to enforce the lien, in his own name, for a reimbursement. A lien-claim for such services cannot be enforced in the name of an assignee. *Pearsons v. Tincker*, xxxvi. 384.

45. The Penobscot Boom Corporation has a lien upon logs caught and rafted in the boom for toll or boomage. *Huckins v. Cushing*, xxxvi. 423.

46. To enforce a lien-claim on logs, against an administrator of an estate represented insolvent, under the Act of 1851, c. 216, the nature of the claim must appear in the writ. *McNally v. Kerswell*, xxxvii. 550.

47. Where the defendant purchased a lot of logs, lying in a distant place, took a bill of sale, and, under it, obtained possession of a part, and designed to secure the residue, in an action against him by one having a lien:—*Held*, that he was liable for the value of those only, which he had actually received. *Leisherness v. Berry*, xxxviii. 80.

48. A lien upon logs or vessels may be secured by an attachment of them. But when judgment has been rendered upon such claim, and the attachment lost by lapse of time, no lien-claim can be enforced by an *alias* execution issued thereon. *Robinson v. Bunker*, xxxviii. 130. *Clapp v. Glidden*, xxxix. 448.

49. An inn-holder has a lien for the entertainment of his guest, upon his property committed to his charge. *Stanwood v. Woodward*, xxxviii. 192.

50. But before such lien can be established, he must prove that he is an inn-holder according to the R. S. of 1841, c. 36. *Stanwood v. Woodward*, xxxviii. 192.

51. The right of lien under R. S. of 1841, c. 125, § 35, extends to the employee of a contractor with the owner of the vessel, although the contractor has received his pay in full. *Atwood v. Williams*, xli. 409.

52. An action, commenced before the expiration of a lien, and to enforce it, may be prosecuted to judgment and execution, against an administrator or executor, notwithstanding the death and insolvency of the debtor. *Pratt v. Seavey*, xli. 370.

53. So, also, in case of a defendant under guardianship by reason of insanity, whose estate has been duly represented insolvent. *Pratt v. Seavey*, xli. 370.

54. The plan of a house, the model of a ship, or the mould by which a ship's timbers are formed, cannot be regarded as within the statutes of lien. *Ames v. Dyer*, xli. 397.

55. Under the Act of 1855, c. 144, owners of logs, attached under the lien law, "may come into Court and *defend*" the suit. But they cannot try the question of lien. *McPheters v. Lambert*, xli. 469.

56. An inn-keeper, to whom a horse is committed to be doctored, has a lien thereon, either as an inn-keeper or farrier, for his reasonable charges; and until such lien be discharged, replevin by the owner is not maintainable. *Danforth v. Pratt*, xlii. 50. *Vide LIEN*, 36.

57. A general lien, at common law, is the right to retain the property of another, to secure a general balance of accounts. *Taggard v. Buckmore*, xlii. 77.

58. The lien provided in R. S. of 1841, c. 125, § 35, extends no further than to be security for the price of the labor and materials actually expended upon the property to which it attaches. *Taggard v. Buckmore*, XLII. 77.

59. Materials, sold under the representation that they would be wrought into a certain vessel, but which, in fact, were incorporated into a vessel other than that designated, create a lien only on the vessel in which they were used. *Taggard v. Buckmore*, XLII. 77.

60. A lien is not secured by attachment in the usual form; but the nature of the claim must appear in the writ. Otherwise, it confers on the attaching creditor no rights superior to any other creditor. *Perkins v. Pike*, XLII. 141. *Stedman v. Perkins*, XLII. 130.

61. The general owner of a vessel by mortgage holds it equitably, subject to a lien for what, by accession, has vested in himself, and enhanced the value of his interest in that of which it has become a part. *Perkins v. Pike*, XLII. 141.

62. The lien of a common carrier, does not deprive the owner of the goods of his right to immediate possession, as against a tort feazor. *Ames v. Palmer*, XLII. 197.

63. A common carrier has the right to retain possession of the goods transported by him, until his reasonable charges are paid. *Ames v. Palmer*, XLII. 197.

64. R. S. of 1841, c. 67, § 9, is not applicable to the case of a party who *aids* in driving the intermingled logs of himself and another. It gives no lien for such service. *Lord v. Woodward*, XLII. 497.

65. When the driving is the joint work of two or more owners, each may recover of the other compensation for any excess of service beyond his equitable share; but neither has a lien for such excess. *Lord v. Woodward*, XLII. 497.

66. Under the Act of 1848, c. 72, the proceedings in regard to the debtor are *in personam*; but in regard to the general owner, when the laborer has contracted with another person, the proceedings are strictly *in rem*. *Bicknell v. Trickey*, XXXIV. 273. *Redington v. Frye*, XLIII. 578.

67. In order to secure a lien upon logs, under the Act of 1848, c. 72, the attachment must be made by virtue of a legal precept, conferring the requisite authority upon the officer. *Cunningham v. Buck*, XLIII. 455. *Redington v. Frye*, XLIII. 578.

68. A declaration in common form on an account containing no allegation of any claim upon the logs, in a precept not authorizing the officer to attach the logs only, with a judgment and execution corresponding, will not authorize a sale of the logs upon such execution to satisfy a lien-claim. *Cunningham v. Buck*, XLIII. 455. *Redington v. Frye*, XLIII. 578.

69. To enforce a lien for services on logs, the property on which the labor was performed should be specifically inserted in the writ, as the property to be attached, and the officer therein ordered to attach it. *Redington v. Frye*, XLIII. 578.

70. An officer cannot regard the averments in the declaration, or the indorsement of the attorney on the back of the writ, when inconsistent with the express commands to him within directed. *Redington v. Frye*, XLIII. 578.

71. Until the Act of 1855, c. 144, the *res* could not be legally represented in Court. Under that Act, in order to preserve the lien on logs attached,

the owners must have due notice of the pendency of the suit. *Redington v. Frye*, XLIII. 578.

See ASSUMPSIT, 8.

BANKRUPTCY, 6, 7.

INSOLVENT ESTATES, 3.

## II. WAIVER OR EXTINGUISHMENT OF LIENS.

72. A lien, created by contract, is not discharged by permitting the general owner or his assignee to take possession of the property, if consistent with the contract, course of business and intention of the parties. *Spaulding v. Adams*, XXXII. 211.

73. Where one, entitled to a lien on property, acts inconsistently with the preservation of his lien, the presumption is, that he has waived or abandoned it, unless such acts be satisfactorily explained. *Spaulding v. Adams*, XXXII. 211.

74. If a creditor, in taking judgment for a lien-claim, include with it in the judgment another claim to which no lien attached, the lien is thereby waived and defeated. *Lambard v. Pike*, XXXIII. 141. *Spofford v. True*, XXXIII. 283. *Bicknell v. Trickey*, XXXIV. 273. *McCrillis v. Wilson*, XXXIV. 286. *Johnson v. Pike*, XXXV. 291. *Pearsons v. Tincker*, XXXVI. 384. *Robinson v. Bunker*, XXXVIII. 130. *Perkins v. Pike*, XLII. 141.

75. The consent of a commission merchant to become keeper, for the attaching officer, of the goods left with him for sale, does not defeat his right to maintain replevin against such officer to secure his lien. *Sewall v. Nichols*, XXXIV. 582.

76. The repeal of a statute, giving a lien on property, defeats the lien remedy, although, at the time of the repeal, the statute proceedings for enforcing the lien had been instituted and were rightfully pending in Court. *Bangor v. Goding*, XXXV. 73.

77. Prior to the enactment of the Act of 1851, the acceptance of a negotiable note for the amount of one's personal labor upon lumber, discharged the lien. *Coburn v. Kerswell*, XXXV. 126.

78. A lien for erecting or repairing buildings is lost, unless secured by attachment within ninety days from the pay-day. *Johnson v. Pike*, XXXV. 291.

79. The lien, for toll or boomage, given to the Penobscot Boom Corporation, is dissolved by a voluntary and unconditional delivery of the logs to the owner. *Huckins v. Cushing*, XXXVI. 423.

80. Any lien for his advances, which may be given to the merchant upon the outfits of a vessel for a fishing voyage, by him sold unconditionally to the owner, is dissolved, when he parts with the possession of the property sold. *Folsom v. Mer. Mut. Mar. Ins. Co.*, XXXVIII. 414.

81. For materials furnished under R. S. of 1841, c. 125, § 35, when sold on time, which had not elapsed when the "four days after the vessel is launched" have expired, the lien is waived. *Scudder v. Balkam*, XL. 291.

82. A lien may be waived or lost by voluntarily parting with the possession of the goods. *Danforth v. Pratt*, XLII. 50.

83. It may be surrendered by agreement between the parties founded upon valuable consideration. *Danforth v. Pratt*, XLII. 50.

84. The verbal agreement, not executed, of an inn-keeper, to send home a horse which he has kept and doctored, in consideration of an unwritten promise of a third party to pay the amount necessary to discharge the lien, is not a waiver of his lien. *Danforth v. Pratt*, XLII. 50.

85. A. sold a quantity of iron to B., part of which was incorporated into a vessel and the balance otherwise appropriated. A. afterwards recovered judgment for the whole of the iron:—*Held*, that this was a waiver of the lien. *Taggard v. Buckmore*, XLII. 77.

86. Where materials are furnished for the construction of a vessel, but before its completion, and before all of such materials have been wrought into said vessel, the material man sues the vendee for the whole of said materials:—*Held*, that the lien was waived. *Perkins v. Pike*, XLII. 141.

## LIFE.

1. Ordinarily, in absence of evidence to the contrary, the continuance of the life of an individual to the common age of man, will be assumed by presumption of law. *Stevens v. McNamara*, XXXVI. 176.

2. But, after an absence from his home, or place of residence, seven years, without intelligence respecting him, the presumption of life will cease. *Stevens v. McNamara*, XXXVI. 176.

3. These presumptions may be repelled; and the burthen of proof is upon the party asserting the facts. *Stevens v. McNamara*, XXXVI. 176.

## LIMITATIONS, STATUTE OF.

## I. IN GENERAL.

## II. EXCEPTIONS, AND AVOIDANCE.

## I. IN GENERAL.

- (a) PERSONAL ACTIONS.
- (b) ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.
- (c) ACTIONS AGAINST SHERIFFS.
- (d) PENAL ACTIONS.
- (e) COMPUTATION OF TIME.

(a) *Personal actions.*

1. The statute of limitations does not apply to claims for flowage under a judgment. *Knapp v. Clark*, XXX. 244.

2. An indictment for a forfeiture, incurred by a town for a defect in its highways, whereby loss of life occurred, is not barred by R. S. of 1841, c. 145, § 15, limiting it to one year, nor by the 16th § of the same chapter, limiting it to two years. *State v. Bangor*, XXX. 341.

3. Though an action upon a note against the principal would be barred by the statute, that limitation would be no bar to a suit against the principal for reimbursement, brought by the surety, who had paid the note before the limitation attached. *Odell v. Dana*, xxxiii. 182.

4. Actions on judgments of the County Commissioners are limited to six years. *Woodman v. Somerset Co. Com.*, xxxvii. 29.

5. In a suit upon a joint and several note, against the principal, and amended under R. S. of 1841, c. 115, § 12, by making the surety a party after six years from the time the cause of action accrued; the surety may interpose the statute of limitations as to himself. *Woodward v. Ware*, xxxvii. 563.

6. Whether such could be done had the contract been incapable of being severed, *quere*. *Woodward v. Ware*, xxxvii. 563.

7. An indorsee of a witnessed note, made prior to the passage of the Act of 1838, c. 343, may maintain an action after the passage of the Act, although more than six years elapsed between the date of the note and the commencement of the suit. *Reed v. Wilson*, xxxix. 585.

8. Towns may recover for supplies furnished a pauper, in an action commenced within two years after the expiration of two months from the giving of the notice, where no answer is returned. *Robbinston v. Lisbon*, xl. 287. *Vide* LIMITATION, 12.

9. But if an answer be returned within the time prescribed by the statute, denying their liability, the action must be commenced within two years from the return of the answer, or it is barred. *Robbinston v. Lisbon*, xl. 287. *Vide* LIMITATION, 12.

10. If one tenant in common, by agreement with a party having a claim against owners of the common property, assumes the sole liability, and thereby his co-tenants are discharged by such party, on the principle of novation, his right to recover their proportion from his co-tenants is limited to six years from the time they were discharged from the original claim, although he did not in fact pay it then. *Buck v. Spofford*, xl. 328.

11. The payment of such claim by one tenant in common, after the statute bar has attached, will not revive it against his co-tenant. *Buck v. Spofford*, xl. 328.

12. The cause of action by one town against another, for the support of a pauper, accrues at the time of the delivery of notice; and the statute limitation of two years begins then. *Cutler v. Maker*, xli. 594. *Vide* LIMITATION, 8, 9.

See ACTION, 43.

AMENDMENT, 33.

BANKRUPTCY, 15.

(b) *Actions against executors and administrators.*

13. Where a suit, commenced against an executor within four years of his appointment, and, by mistake, the action is not entered, the party cannot avail himself of R. S. of 1841, c. 146, § 12, and maintain a new suit, after the four years. *Packard v. Swallow*, xxix. 458.

14. The four years limitation, mentioned in R. S. of 1841, § 29, applies only to "suits brought," and not to proceedings in the Probate Court. *Greene v. Dyer*, xxxii. 460.



15. Where an executor received moneys within four years from his appointment, collected of the U. S. for alleged claims of his testator against a foreign government, a part of which was claimed by the plaintiff, and that it never was the property of the testator:—*Held*, that an action against the executor therefor could not be brought after the lapse of four years. *Thurston v. Lowder*, XL. 197.

(c) *Actions against sheriffs.*

16. Where a sheriff served a replevin writ without having first taken a replevin bond, and was afterwards sued for such default:—*Held*, that the action was barred by statute of 1821, c. 52, § 16, unless commenced within four years from the time of the alleged service. *Garlin v. Strickland*, XXVII. 443.

(d) *Penal actions.*

17. R. S. of 1841, c. 146, limiting penal actions to one year, does not apply to suits, brought under c. 148, § 49, for aiding a debtor in the fraudulent concealment of his property. *Thacher v. Jones*, XXXI. 528.

18. Prosecutions on penal statutes, in behalf of the State, are limited to two years after the offence has been committed, where no exception is found in the statute. *State v. Hobbs*, XXXIX. 212.

19. The time in which the offence of being a common seller, under Act of 1851, c. 211, may be prosecuted by indictment, is limited to two years. *State v. Gray*, XXXIX. 353.

(e) *Computation of time.*

20. F. conveyed land to S., and gave him an obligation, that if, at the end of a year, the land should not be worth the money received therefor, with interest, he would make up the deficiency, "or otherwise pay that amount upon receiving a re-conveyance." S., at the same time, gave F. a bond, that, on being paid the said amount, at any time within the year, he would re-convey the land:—*Held*, that, during the first year, S. could have no right of action against F. on the obligation, because F. had the election to redeem within the year; but, at the end of the year, his right of action accrued, and, therefore, the statute of limitations began from that period. *Smith v. Fiske*, XXXI. 512.

21. In computing the four years, in which suits may be brought against an executor, the period is not to be reckoned during which his official action is suspended by an appeal from the decree appointing him to office. *McPheters v. Halley*, XXXII. 72.

22. A memorandum and promise, in writing, by the makers of a note, to pay it "in any time within six years" from the date of the writing, though attested, is not a witnessed note, but is subject to the limitation bar of six years. *Young v. Weston*, XXXIX. 492.

23. Where a lunatic, taken up in a town in which he has no legal settlement, is committed to the hospital, under the statute, the cause of action for his support originates at the time payment is made to the hospital; and the limitation bar begins then. *Eastport v. Machias*, XL. 280.

(f) *Mortgages.*

24. Twenty years undisturbed possession, by a mortgagee or his assignee, operates as a bar to the right of redemption, unless the mortgager can bring himself within the exception of the statute. *Hurd v. Coleman*, XLII. 182.

## II. EXCEPTIONS AND AVOIDANCE.

- (a) PARTIES ABROAD.
- (b) ATTESTED NOTE.
- (c) ACCOUNTS.
- (d) CONCEALMENT OF CAUSE OF ACTION.
- (e) COMMENCEMENT OF ACTION.
- (f) ACKNOWLEDGMENT, WAIVER, OR PROMISE.
- (g) PAYMENT.
- (h) OTHER THINGS.

(a) *Parties abroad.*

25. To a note of hand, made in New Brunswick, to the plaintiff, who has ever resided there, the maker, though having lived in this State eleven years, cannot set up the statute of limitations. *McMillan v. Wood*, XXIX. 217.

26. By the statute of limitations, a plaintiff may consider himself under a disability to sue, while he is "without the limits of the U. S.;" the statute, therefore, makes an exception in his favor. *Varney v. Grows*, XXXVII. 306.

27. That disability ceases, however, upon his return to any port of the U. S., however distant from the State of his domicil. *Varney v. Grows*, XXXVII. 306.

28. The *residence* contemplated by R. S. of 1841, c. 146, § 28, is synonymous with *dwelling place* or *home*. *Drew v. Drew*, XXXVII. 389. *Warren v. Thomaston*, XLIII. 406.

29. An absence from the State, though long continued, without evidence of an abandonment of his home within it, will not prevent the attachment of the statute. *Drew v. Drew*, XXXVII. 389.

30. The *residence* without the State must be an "established residence or home." *Bucknam v. Thompson*, XXXVIII. 171.

31. If, at the time a cause of action accrues against a debtor, he has a home in this State, it remains such, though he is absent for special purposes, and for periods which were definite as to time or purpose, so long as there should remain the intention to return. *Bucknam v. Thompson*, XXXVIII. 171.

(b) *Attested note.*

32. The statute of limitations is no bar to an action, brought in the name of an indorsee, upon a witnessed negotiable promissory note. *Stanley v. Kempton*, XXX. 118.

33. A payment, made upon a witnessed note, gives it new life for the next twenty years. *Estes v. Blake*, XXX. 164. *Howe v. Saunders*, XXXVIII. 350.

34. The remedy of the holder, in such case, is upon the note itself, and not upon any implied promise, supposed to arise from such payment. *Estes v. Blake*, XXX. 164. *Vide* LIMITATION, 38.

35. The exception, in the statute of limitations, in favor of witnessed notes, applies only to those made payable in money unconditionally. *Dennett v. Goodwin*, xxxii. 44.

36. On a witnessed note, an action cannot be maintained after the lapse of twenty years from the time it was made payable. *Howe v. Saunders*, xxxviii. 350.

37. The presumption of payment after twenty years, may be rebutted by any acts within that time. *Howe v. Saunders*, xxxviii. 350.

38. When the new promise is made or arises, after the right to maintain a suit upon the original cause of action has been entirely extinguished, or when the new promise varies from the original, there should be a count upon the new promise; and in other cases, the declaration may be upon the original promise only. *Howe v. Saunders*, xxxviii. 350.

#### (c) *Accounts.*

39. In a suit upon a witnessed note, an account, barred by the statute, but of about the same date with the note, and larger in its amount, was filed in set-off:—*Held*, that, as a set-off, the law would not sustain it, nor allow so much of it to be proved as to balance the note. Neither will the law appropriate the account to the payment of the note, nor presume, after any lapse of time, that the plaintiff had so appropriated it. *Nason v. McCulloch*, xxxi. 158.

40. The plaintiff cannot give in evidence a set-off, made and filed by the attorney of the defendant, which was withdrawn by leave of Court, before trial, for the purpose of showing charges made against him within six years from the commencement of his action upon an account. *Theobald v. Stinson*, xxxviii. 149.

41. But, *it seems*, that if such set-off had been personally filed by the defendant, or had been in his handwriting, the act done, and the contents of the paper might be admissible. *Theobald v. Stinson*, xxxviii. 149.

42. Where the limitation has attached to all the items of the plaintiff's account, he cannot revive it by showing some acts of labor performed by defendant for him, within six years from the commencement of his action, unless there was some account made of it. *Theobald v. Stinson*, xxxviii. 149.

#### (d) *Concealment of cause of action.*

43. In a suit upon a contract, the plaintiff may be relieved from the statute of limitations, by plea and proof, that the defendant fraudulently concealed from him, the knowledge of the cause of action. *McKown v. Whitmore*, xxxi. 448.

44. But that relief cannot extend to a plaintiff, who had direct and ample means, in the exercise of ordinary prudence, to detect the fraud. *McKown v. Whitmore*, xxxi. 448.

45. The adjustment of mutual accounts on settlement between the parties, according to the book kept by plaintiff, in which, by mistake, an article had been wrongfully credited to the defendant, would not show such a fraud or fraudulent concealment of the cause of action, as to avoid the statute. *Brown v. Edes*, xxxvii. 318.

46. A portion of an account which had accrued more than six years prior

to the commencement of the suit, was presented by plaintiff, a part owner of a vessel, to the defendant, another part owner, for payment; when the latter denied any ownership in the vessel:—*Held*, such denial not to be a fraudulent concealment of the cause of action. *Rouse v. Southard*, xxxix. 404.

47. Where a party relies upon an offer to prove a fraudulent concealment of the cause of action, to avoid the limitation bar, such offer, in the report of the Court, must clearly appear to have embraced all the statute requirements in that particular. The time when the concealment was discovered must not be left in doubt. *Thurston v. Lowder*, xl. 197.

(e) *Commencement of Action.*

48. The limitation bar is not suspended for six months, where the writ was abated by reason of being brought in the wrong county. *Donnell v. Gatchell*, xxxviii. 217.

See ACTIONS, &c., 87—90.  
BOND, 24.

(f) *Acknowledgment, waiver, or promise.*

49. An agreement by the defendant, made since R. S. of 1841, c. 146, has been in force, “to waive any defence he might have had by virtue of the statute of limitations, and take no advantage of the same,” will not take the contract out of the statute, unless the agreement be in writing and signed “by the party chargeable thereby.” *Hodgdon v. Chase*, xxix. 47.

50. A verbal promise, made by a debtor, in consideration of a pay-day extended, that he will not take advantage of the statute of limitations, will not support an action brought upon the breach of such promise. *Hodgdon v. Chase*, xxxii. 169.

51. Charges, made annually by the treasurer against himself, in the corporation books, for annual interest on funds borrowed, brought down to a period within six years from the date of the writ, are recognitions of the debt, by which the limitation bar is removed. *Bluehill Academy v. Ellis*, xxxii. 260.

52. The statute of limitations provides, that if there be two or more joint contractors, no one of them shall be chargeable by reason only of any acknowledgment or promise made by any other of them. *Odell v. Dana*, xxxiii. 182. *Wellman v. Southard*, xxx. 425.

53. And this applies to a note given by co-partners. *True v. Andrews*, xxxv. 183. *Wellman v. Southard*, xxx. 425.

53. Neither will it make any difference, if the note was made prior to R. S. of 1841, and the promise since. *Wellman v. Southard*, xxx. 425.

54. The statute bar will not be dislodged against the defendant, one of two joint promisors, by proof, that he, within the last six years, included the note in an unsigned schedule of his indebtedness, made by himself for his own use. Neither would it affect any thing had it been signed. *Wellman v. Southard*, xxx. 425.

55. E. and S., while co-partners, gave a joint and several note in their individual capacities, for a partnership debt. E. sold all his interest in the concern to N., who was to pay E.’s half of the debts. Within the last six years, S. notified N., that the note in suit was justly due, and N. consented it should be paid; and, afterwards, S. collected sufficient of the company

claims to pay the note and all other company debts:—*Held*, that these facts removed the statute bar. *Wellman v. Southard*, xxx. 425.

56. A mere acknowledgment, made by an administrator of the intestate's indebtedness, will not remove the statute bar. *Bunker v. Athearn*, xxxv. 364.

57. Neither will a written admission by the defendant, that "he does not claim," and "never did own or claim" an article credited to him by mistake, and that "he had never claimed any exemption from liability on account of time." *Brown v. Edes*, xxxvii. 318.

See *BILLS, &c.*, 98, 164.

(g) *Payments.*

58. Under R. S. of 1841, c. 146, § 24, a payment, made by one of two joint promisors, in the presence of the other, is not evidence of a new promise by both. *Quimby v. Putnam*, xxviii. 419.

59. But, before the enactment of that statute, it was otherwise. *Patch v. King*, xxix. 448.

60. Upon a witnessed note, on which a partial payment has been made within twenty years, there arises no presumption of payment, from mere lapse of time. *Estes v. Blake*, xxx. 164.

61. Since, as well as before the R. S. of 1841, a new promise may be implied from a partial payment upon a note. *Sibley v. Lumbert*, xxx. 253.

62. Such a payment, made within six years before the commencement of the suit, will avoid the statute of limitations; and it may be proved by parol. *Sibley v. Lumbert*, xxx. 253. *Evans v. Smith*, xxxiv. 33.

63. A partial payment of a witnessed note, by a co-promisor, before the enactment of R. S. of 1841, removed the statute bar as to all the makers, and renewed it for twenty years after such payment. *CUTTING, J.*, dissenting. *Lin. Academy v. Newhall*, xxxviii. 179.

(h) *Other things.*

64. R. S. of 1841, c. 146, § 25, does not make the twenty years a bar, but creates a presumption of payment, which may be rebutted. *Brewer v. Thomes*, xxviii. 81.

65. Evidence of the poverty of the debtor, a demand of payment by the creditor, and an answer by the debtor, "that he would come up soon and do something about it," is sufficient to repel such presumption. *Brewer v. Thomes*, xxviii. 81.

66. An action upon a note, given by a person to the bankrupt, before the decree of bankruptcy, is not limited by the eighth section of United States Bankrupt Act of 1841, to two years. *Carr v. Lord*, xxix. 51.

67. The statute of limitations, of its own force, does not cut off claims, unless it be presented to the Court as a defence. *Ware v. Webb*, xxxii. 41.

68. It is not necessary to allege in the declaration that the cause of action accrued within six years; or that the note was witnessed. *Ware v. Webb*, xxxii. 41.

69. The limitation in section eight, of the Bankrupt Law of 1841, applies to actions in the name of an assignee in bankruptcy, though brought wholly for the benefit of a third party. *Pike v. Lowell*, xxxii. 245.

70. It is the *lex fori*, and not the *lex loci contractus*, by which the plea of a limitation-bar is to be adjudicated upon. *Thibodeau v. Levassuer*, xxxvi. 362.

71. Section eight of the Bankrupt Act of 1841, does not limit the assignee to two years, in which to make conveyances of the real estate. *Warren v. Miller*, xxxviii. 108.

## LIQUOR, SPIRITUOUS AND INTOXICATING.

- I. CONTRACTS IN REGARD TO, AND CIVIL ACTIONS.
- II. CRIMINAL PROCESSES.
- III. LICENSES AND AGENCIES TO SELL.

### I. CONTRACTS IN REGARD TO, AND CIVIL ACTIONS.

1. In an action of debt, under the Act of 1846, c. 205, in the name of the inhabitants of a town, to recover a penalty for selling spirituous liquors, without license, the selectmen's, clerk's and treasurer's approval, indorsed upon the writ, and their personal presence at the trial, are sufficient authority to the attorney to prosecute the suit. *New Gloucester v. Bridgham*, xxviii. 60.

2. The declaration is sufficiently specific as to time, if it allege that the sale took place on the day named in a certain month; and it is not necessary that the act proved should be on the precise day alleged. *New Gloucester v. Bridgham*, xxviii. 60.

3. If the declaration alleges that the defendant "did sell a quantity of spirituous liquors, to wit; one glass of rum," &c., enumerating one glass of the several kinds of liquors, "and one glass of spirituous liquor, or a part of which was spirituous, to certain persons unknown," and the proof was the sale of one glass of gin, to a certain person named, an objection on this ground can be taken advantage of only by demurrer. *New Gloucester v. Bridgham*, xxviii. 60.

4. Where the statute penalty is from one to twenty dollars, and the parties agree that the jury shall ascertain the amount to be recovered, and the Judge admits evidence of other sales, with a view to enhance the penalty, against defendant's objection, the defendant cannot be considered as aggrieved by the admission of such evidence. *New Gloucester v. Bridgham*, xxviii. 60.

5. On cross-examination by the defendant, the Judge, in the exercise of a sound discretion, may rightly permit an inquiry to a witness for his reasons why he did certain acts, to test the accuracy of his recollection, or to affect his credibility, although it may have no direct tendency to support or disprove the issue. *New Gloucester v. Bridgham*, xxviii. 60.

6. Where the declaration alleges that the plaintiffs, being inhabitants of a town, "prosecute this action by" certain persons named, one of the persons so named does not thereby become a party to the suit, and, hence, incompetent as a witness. And, if he did, he is rendered competent by the statute. *New Gloucester v. Bridgham*, xxviii. 60.

7. The declarations of the defendant, that he had kept and would keep spirituous liquors for sale, although they did not immediately accompany the

act of sale, as proved, are admissible. *New Gloucester v. Bridgham*, xxviii. 60.

8. A contract, in violation of a statute, when introduced as evidence of a right to recover thereon, may be effectually resisted by a party or privy to it, but not by a stranger. *Ellsworth v. Mitchell*, xxxi. 247.

9. Where a mortgage is made to secure a claim, void by statute, and a subsequent mortgage is made to another person, to secure a lawful debt, the receiving of the money by the first mortgagee, for his claim, will not subject him to an action by the subsequent mortgagee to recover such money. *Ellsworth v. Mitchell*, xxxi. 247.

10. A prosecution for unlawfully selling spirituous liquor may be by civil action or by complaint. *Ricker, pet'r*, xxxii. 37. *Hanson, pet'r*, xxxvi. 425.

11. The Act of 1846, c. 205, § 2, does not prohibit actions of trover for the unlawful conversion of liquor. *Sullivan v. Park*, xxxiii. 438.

12. The fact, that the defendant made the sale as the servant of another person, is no defence to a suit to recover a penalty incurred under that Act. *Roberts v. O'Conner*, xxxiii. 496.

13. A contract, legally made in another State, may be enforced in this State, when, by its laws, it would have been illegal. *Torrey v. Corliss*, xxxiii. 333.

14. The Act of 1851, c. 211, is prospective only, because it does not contain any clearly expressed intention that it shall be retroactive. *Torrey v. Corliss*, xxxiii. 333.

15. In an action under the Act of 1846, c. 205, originated before a magistrate, no appeal lies from the District Court to this Court. *Roberts v. O'Conner*, xxxiii. 496.

16. Notwithstanding the Act of 1851, c. 211, § 16, an action at law may be maintained for liquors, when not liable to seizure and forfeiture, or intended for sale in violation of law. *Preston v. Drew*, xxxiii. 558. *Nichols v. Valentine*, xxxvi. 322. *Jones v. Fletcher*, xli. 254. *Dolan v. Buzzell*, xli. 473. *Lord v. Chadbourne*, xlii. 429.

17. In a written contract for the sale of all the stock of goods in an apothecary's store, the spirituous liquors within the store and belonging to the vendor, are, *ex vi terminorum*, included. *Ladd v. Dillingham*, xxxiv. 316.

18. If the vendor had no license to sell such liquors, the contract cannot be enforced against the vendee. *Ladd v. Dillingham*, xxxiv. 316.

19. The making of a separate schedule of the liquors, by direction of both parties, if designed as an evasion of the statute, cannot make the contract effectual as to the other goods. *Ladd v. Dillingham*, xxxiv. 316.

20. The law prohibits a sale of spirituous liquors at auction, and hence they cannot be attached. *Nichols v. Valentine*, xxxvi. 322.

21. When a penalty is recovered by an action before a magistrate, under the Act of 1851, c. 211, the judgment is to be enforced by execution. *Hanson, pet'r*, xxxvi. 425.

22. In such case, the issuing of a mittimus for commitment is unauthorized. *Hanson, pet'r*, xxxvi. 425.

23. In a suit against a co-partnership, to recover back money paid for liquors illegally sold, the proof of the illegal sale is insufficient, if one of the co-partners had license to sell, unless it be shown that the sale was made by

the other. *RICE* and *HATHAWAY*, J. J., dissenting. *Webber v. Williams*, xxxvi. 512.

24. In such case, the presumption of law is, that the sale was made by the co-partner who had a right to make it. *Webber v. Williams*, xxxvi. 512.

25. By the Act of 1846, c. 205, § 10, no action could be maintained upon any claim or demand in whole or in part for spirituous liquors, sold in violation of law. *Cochrane v. Clough*, xxxviii. 25.

26. Where some of the items of an account in suit were for such liquors, and, on trial, by leave of Court, were stricken out, and no exceptions taken to such amendment, a legal judgment may be rendered for the remainder. *Cochrane v. Clough*, xxxviii. 25.

27. Under the last mentioned Act, no warrant can issue for the seizure of the vessels containing liquors designed for illegal sale. *Black v. McGilvery*, xxxviii. 287.

28. Where a town, under Act of 1851, c. 211, institutes a suit to recover the value of liquors sold by their agent, it is essential that they show, by legal evidence, that he was their legal agent. *Foxcroft v. Crooker*, xl. 308.

29. The original bond and certificate or a properly certified record are the legal evidence required. *Foxcroft v. Crooker*, xl. 308.

30. An action cannot be maintained in this State, under the Act of 1851, c. 211, for the price of intoxicating liquors. *Dearborn v. Hoit*, xli. 120.

31. The appointment of the plaintiff, as agent of the town to sell liquors, gives him no rights in the maintenance of an action against an officer for seizing such liquors, so long as the latter, being an officer, was bound to execute the warrant and was protected therein. *Gray v. Kimball*, xlii. 299.

See ATTACHMENT, 8.

CONSTITUTIONAL LAW, 22, 24, 25, 26, 30, 37, 40, 41.

## II. CRIMINAL PROCESSES.

(a) ACTS OF 1846 & 1848.

(b) ACT OF 1851.

(c) ACT OF 1853.

(d) ACT OF 1855.

(e) ACT OF 1856.

(a) *Acts of 1846 & 1848.*

32. A warrant, under Act of 1846, c. 205, may be lawfully executed on the Lord's day, although, perhaps, subject to the limitation, that it should not be an unnecessary act, to be done on that day. *Keith v. Tuttle*, xxviii. 326.

33. Such persons as were called by him, to aid and assist him in the service of such warrant, might, nevertheless, be excusable, whether the act was unnecessary or not. *Keith v. Tuttle*, xxviii. 326.

34. The intention of the Act of 1846, c. 205, is to forbid the sale, without a license, of domestic spirituous liquors, in any quantity; and of foreign spirituous liquors, in any less quantity than is allowed to be imported by the laws of the U. S. *State v. Crowell*, xxx. 115.

35. If, therefore, a complaint allege a sale in a less quantity than the



revenue laws prescribe, it need not specify whether the liquor was or was not imported. *State v. Crowell*, xxx. 115.

36. Under this Act, it is not necessary to allege in the complaint, nor prove by whom the defendant made the sale. *State v. Stewart*, xxxi. 515. *State v. Brown*, xxxi. 520.

37. Whether wine be a spirituous liquor is a question of fact, unless the Act was designed to include it among spirituous liquors. Of which, *quere. State v. Stewart*, xxxi. 515.

38. When intoxicating liquor is furnished by one party to another, it is the province of the jury to find whether there was a sale. *State v. Greenleaf*, xxxi. 517.

39. In a prosecution for such sale, the declarations of the defendant, subsequently made, as to his intentions, are not admissible. *State v. Greenleaf*, xxxi. 517.

40. The legal principle, that pay for such liquors, sold in violation of the statute, cannot be collected by law, furnishes no defence, in such a prosecution. *State v. Greenleaf*, xxxi. 517. *Emerson v. Noble*, xxxii. 380.

41. Nor the fact, that the liquor was sold and used solely for medicinal purposes, if the defendant had no license. *State v. Brown*, xxxi. 522.

42. The exception, in the first section of this Act, is sufficiently negated by an averment that the liquor was not imported into the United States from any foreign port or place. *State v. Brown*, xxxi. 522.

43. A prosecution for unlawfully selling spirituous liquor may be by civil action or by complaint. *Ricker, pet'r*, xxxii. 37. *Hanson, pet'r*, xxxvi. 425.

44. In case of conviction, it is not necessary that the magistrate wait forty-eight hours to give opportunity of appeal. It may be made after commitment. *Ricker, pet'r*, xxxii. 37.

45. The penalty for a second offence belongs to the State. That the magistrate awarded one-half of it to the prosecutor, furnishes to the offender no just ground of complaint. *Ricker, pet'r*, xxxii. 37.

46. Costs may be awarded, in addition to the penalty, in such cases. *Ricker, pet'r*, xxxii. 37.

47. The penalty for selling prohibited liquor, without license, may be incurred, although the sale was upon credit, and although the law furnishes to the seller no means of enforcing payment. *Emerson v. Noble*, xxxii. 380.

48. A conviction for presuming to be a common seller of intoxicating liquors, within a specified period, is not a bar to a prosecution for a single sale within the same period. *State v. Coombs*, xxxii. 529. *State v. Maher*, xxxv. 225.

49. Where the appropriate record shows that the authorities have licensed the *maximum* number of persons allowed by law for selling intoxicating liquors, and does not show that any additional number has been licensed, the defendant's production of an unrecorded license is no defence. *State v. Shaw*, xxxii. 570.

50. By the Act of 1846, c. 205, the sale of "spirituous" liquors was restricted. By the Act of 1848, the sale of "intoxicating" liquors was restricted. The repeal of the Act of 1848, by that of 1851, c. 211, § 18, does not defeat prosecutions under the Act of 1846, for the sale of spirituous liquors. *Parsons v. Bridgham*, xxxiv. 240.

See BILLS, &c., 44.

(b) *Act of 1851.*

51. To obtain a forfeiture under the Act of 1851, c. 211, it must be alleged in the complaint and proved, that the liquors were intended for sale in the city or town in which they were kept or deposited, and by some person not authorized so to do. *State v. Gurney*, xxxiii. 527. *State v. Robinson*, xxxiii. 564. *McGlinchy v. Barrows*, xli. 74.

52. A complaint, charging the crime of having sold a quantity of spirituous liquor at S., in the county of Y., on a certain day named, to wit, one glass of brandy to one M. L., of said S., charges no offence. *State v. Lane*, xxxiii. 536.

53. The Act of 1851, though it provides for the seizure and forfeiture of liquors when designed for sale, does not enact that no property can be acquired in them when not designed for unlawful sale; but recognizes them as subjects of property, when kept for certain purposes. *Preston v. Drew*, xxxiii. 558.

54. The prohibition to sell such liquors does not prevent the acquisition of property in them, or the transport of them through the State, when not designed for unlawful sale. *Preston v. Drew*, xxxiii. 558.

55. It is not necessary, under this Act, to aver or prove that liquors were intended for sale in the shop, or other building, wherein they were kept or deposited. *State v. Robinson*, xxxiii. 564.

56. The requirement of the Constitution in reference to search-warrants, that "a special designation of the place to be searched" shall be made, is not answered by words, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. *State v. Robinson*, xxxiii. 564. *Jones v. Fletcher*, xli. 254.

57. An article to be searched for may be described in the warrant, simply by its generic name, if it be destitute of any peculiar and known marks or qualities, by which it can be distinguished. *State v. Robinson*, xxxiii. 564.

58. The officer's return, which omits to state how long the liquors had been advertised, or that the notice posted contained the number or any description of the packages, is too defective to authorize a decree of forfeiture. *State v. Robinson*, xxxiii. 564.

59. Where a claimant appears, legal proof that the liquors were kept for sale by the owner or keeper is an essential prerequisite to a decree of forfeiture, and to the imposition of a fine. And neither the affidavit in the complaint, nor the recitals in the warrant, nor the officer's return, can be taken as evidence upon that point. *State v. Robinson*, xxxiii. 564.

60. When the complaint names no person as the owner, keeper or claimant of the liquors, the swearing of the jury in the form of a criminal trial is irregular. The finding that the defendant is guilty would be merely void, there being no issue upon which it could rest. *State v. Robinson*, xxxiii. 564.

61. In a prosecution by the State, an inhabitant of the town to which the law appropriates the penalty, if recovered, is a competent witness for the State. *State v. Woodward*, xxxiv. 293.

62. In such prosecution, if the defendant relies on a license for the sale, the *onus* is upon him. *State v. Woodward*, xxxiv. 293.

63. In a criminal prosecution for presuming to be a common seller, proof that the defendant had a license as an inn-holder, and as a common victualer, establishes no defence. *State v. Woodward*, xxxiv. 293.

64. An indictment, charging that the accused was a common seller, &c., "without any lawful authority, license or permission," sufficiently negatives the exception in the statute. *State v. Keen*, xxxiv. 500.

65. The liability of an agent to a revocation of his appointment, and to a suit upon his bond, would constitute no protection from the penalty of the 8th sect. of the Act, if he should wilfully become a common seller. *State v. Keen*, xxxiv. 500.

66. It is not a fatal objection to a complaint, that it employs Arabic numerals, or long used and well understood abbreviations, to express the time when the offence was committed, or the complaint made and sworn to. *State v. Reed*, xxxv. 489.

67. The term "one glass" is a sufficient designation of the quantity sold. *State v. Reed*, xxxv. 489.

68. A judgment under this Act is reversible for error, if neither the complaint nor the judgment shows that the liquors were intended for sale in the city, town or place where they were kept or deposited. *Barnett v. State*, xxxvi. 198.

69. In this State, an indictment regards only the laws of the State, against which the offence is committed. It is not necessary to negative possible and contingent defences, which may arise under the statutes of the U. S. or under its treaties. These are matters of defence. *State v. Gurney*, xxxvii. 149. *State v. Robinson*, xxxix. 150.

70. A magistrate might sentence the owner or keeper of liquors "to stand committed for thirty days in default of payment" of the fine imposed, but not to be "imprisoned until he pay the fine or be otherwise discharged by due course of law." *Gurney v. Tufts*, xxxvii. 130.

71. So much of § 6, c. 211, of Act of 1851, as requires the respondent to give bond, &c., "before his appeal shall be allowed," is unconstitutional. *Saco v. Wentworth*, xxxvii. 165.

72. Hence the bond is void. *Saco v. Wentworth*, xxxvii. 165.

73. In an indictment, charging the defendant as a common seller, it is not necessary to aver that they were not imported, &c., or sold in the importation packages. *State v. Gurney*, xxxvii. 149.

74. It is competent for the Legislature to regulate the sale of an article, of which the use would be detrimental to the morals of the people. *State v. Gurney*, xxxvii. 156. *Preston v. Drew*, xxxiii. 558.

75. On an appeal from the sentence of a magistrate, imposing a lawful penalty for a specified offence, it is not competent for the Legislature to require any increase of the penalty to be imposed by the appellate court after conviction by the jury. *State v. Gurney*, xxxvii. 156.

76. So much of the sixth section of the Act of 1851 as requires such increase is unconstitutional and void. *State v. Gurney*, xxxvii. 156.

77. If, however, the defendant, in taking an appeal, acquiesce in the requirements of that Act, he cannot afterwards avail himself of their unconstitutionality, or deny the validity of the appeal. *State v. Gurney*, xxxvii. 156.

78. Such increase of the penalty being unconstitutional and void, the appellate Court, after conviction, may rightfully enforce the appropriate penalty, which the magistrate imposed. *State v. Gurney*, xxxvii. 156.

79. The requirement, that the appellant from a justice of the peace, on con-

viction in the higher Court, shall pay and suffer double the amount of fines, penalties and imprisonment awarded against him by the former tribunal, has no reference to the costs of the prosecution taxed before such justice. *Lord v. State*, xxxvii. 177.

80. In a complaint for violating section four, it is lawful to insert two or more offences of the same nature, in different counts. *Lord v. State*, xxxvii. 177.

81. The Act of 1851, c. 211, § 5, makes it the duty of the mayor and aldermen of a city to commence suits in behalf of the city against any persons guilty of violating any of the provisions of that Act, "on being informed of the same, and being furnished with proof of the act." Such acts, as authorized the commencement of the suit, are not required to be proved to the Court before the suit can be prosecuted in the name of the city. *Portland v. Rolfe*, xxxvii. 400.

82. Neither a physician nor an apothecary, unless appointed by the town as an agent, under this Act, was authorized to sell spirituous liquors for mixture with medicinal ingredients by the purchaser, although the medicines were purchased at the same time with the liquor. *State v. Hall*, xxxix. 107.

83. This Act forbids the sale of spirituous and intoxicating liquors in any quantity, whether imported or domestic, without license. *State v. Robinson*, xxxix. 150.

84. In an indictment against a common seller, averments that the liquors were sold "by retail and in less quantities than the revenue laws prescribe," &c., may be rejected as surplusage. *State v. Robinson*, xxxix. 150.

85. Without proof direct or tending to establish that the sales were by the importer, or of imported liquors in the original packages, the Judge may withhold instructions as to the law in that particular. *State v. Robinson*, xxxix. 150.

86. Section sixteen of this Act, providing that no action of any kind shall be maintained in this State "for recovery or possession of spirituous liquors or the value thereof," the same being kept for sale in violation of law, is constitutional. *Thurston v. Adams*, xli. 419.

87. A mere intent to sell property in violation of law, which may be lawfully used, does not subject the property to forfeiture, at common law, nor deprive the owner of his proper remedy against persons illegally interfering with it. *Dolan v. Buzzell*, xli. 473.

88. Section sixteen of this Act, so far as it applied to actions for the recovery of liquors, or the value of liquors, not liable to seizure or forfeiture, or not intended for sale in violation of law, was unconstitutional. *Dolan v. Buzzell*, xli. 473.

See BILLS, &c., 46.

### (c) *Act of 1853.*

89. It is no defence to a prosecution, under this Act, against an agent for selling to a minor, that the liquor was sent for with the money, by a third person, to whom it might lawfully have been sold, and that the agent was so informed when he delivered it to the minor. *State v. Fairfield*, xxxvii. 517.

90. A magistrate has no authority to issue a warrant to search a dwelling-house, for liquors alleged to be kept for illegal sale, unless it shall first be shown to him by the testimony of witnesses, reduced to writing and verified

by oath, that they have reasonable ground for believing that such liquors are there kept for illegal sale. And such must appear from the complaint or warrant. *State v. Staples*, xxxvii. 228. *State v. Carter*, xxxix. 262. *Jones v. Fletcher*, xli. 254.

91. Delivery of the article is sufficient evidence of sale. *State v. Fairfield*, xxxvii. 517.

92. Under section eleven of this Act, it must appear that a shop or other place is kept for the sale of liquors "in" that part of the building used as a dwellinghouse, without which allegation no warrant could be issued to search the dwellinghouse, without the preliminary testimony having first been taken as prescribed in said section. *State v. Spencer*, xxxviii. 30. *McGlinchy v. Barrows*, xli. 74.

93. It is unnecessary to set forth in the indictment the record in full of a previous conviction for a similar offence. It may be briefly stated, and the identity of the respondent with the one formerly convicted is a matter for the jury. *State v. Robinson*, xxxix. 150.

94. And if the former conviction was upon the plea of *nolo contendere*, it is sufficient. *State v. Robinson*, xxxix. 150.

95. So much of the thirteenth section of this Act as requires the giving of a bond, as therein provided, is unconstitutional and void. *Saco v. Woodsum*, xxxix. 258.

96. And any sale of spirituous or intoxicating liquors by the principal, during the pendency of the appeal, creates no liability on the part of the obligors. *Saco v. Woodsum*, xxxix. 258.

97. But where an action is commenced upon such bond, and the selectmen of the town interested indorsed upon it their approval of the suit, no costs are recoverable by the defendants. *Saco v. Woodsum*, xxxix. 258.

98. The owner of spirituous liquors, seized by virtue of a warrant, in due form, against him, under this Act, cannot replevy them from the possession of the officer who executed it. *Musgrave v. Hall*, xl. 498.

99. A warrant to search the dwellinghouse of a person only authorizes the officer to search the house in which such person lives; and, if he searches a house, hired and occupied by another, though owned by such person, he is guilty of trespass. *McGlinchy v. Barrows*, xli. 74.

100. An officer, acting under a proper warrant for the search of liquors, is justified in forcibly breaking and opening the depot of a railroad, in which the liquors are stored, after the usual time for receiving and delivering goods at the depot, if necessary to the execution of the warrant. *Androscoggin R. R. Co. v. Richards*, xli. 233.

101. Neither is it necessary for the officer first to ask permission, of the person having charge of the depot, to enter and search it. *Androscoggin R. R. Co. v. Richards*, xli. 233.

102. Liquors, though belonging to a town, are not protected against seizure and forfeiture, under this Act, unless the casks and vessels in which they are contained are plainly and conspicuously marked with the name of the town and its agent. *Androscoggin R. R. Co. v. Richards*, xli. 233.

103. A warrant, commanding an officer to search for liquor in a dwelling-house, does not authorize him to search in a barn. *Jones v. Fletcher*, xli. 254.

104. There may be cases in which one may be prosecuted and tried for acts which he never committed, but which were done by another. And laws

authorizing proceedings *in rem* may be enforced against the property seized, without the knowledge of the real owner. *Gray v. Kimball*, XLII. 299.

105. For form of complaint sufficient to authorize subsequent proceedings under this Act, see XLII. 301.

(d) *Act of 1855.*

106. The repeal of this Act takes from the Court all power to render judgment, or to pass sentence, against any one charged with an offence under it. *State v. Boies*, XLI. 344.

107. But where one had appealed from a decision rendered under it, and had recognized, he is liable if the appeal be not entered; the forfeiture claimed under the recognizance being no part of the punishment for the offence. *State v. Boies*, XLI. 344.

108. The right to enforce the recognizance does not depend upon the guilt or innocence of the accused. *State v. Boies*, XLI. 344.

109. The remedy authorized by this statute, for a breach of the condition of the recognizance, is cumulative. *State v. Boies*, XLI. 344.

110. The Act of 1855, c. 166, does not expressly give justices of the peace jurisdiction to convict and sentence offenders under the 2d section of the Act. And such jurisdiction cannot be implied. *Hersom, pet'r*, XXXIX. 476.

111. The general jurisdiction of justices of the peace, in criminal prosecutions, is to impose a fine not exceeding ten dollars, but they have no authority to imprison. *Hersom, pet'r*, XXXIX. 476.

112. A provision authorizing an appeal from the decision of a Court, in criminal cases, cannot give the tribunal from which the appeal is allowed to be made, jurisdiction in all such cases. *Hersom, pet'r*, XXXIX. 476.

113. By § 14, c. 167, of R. S. of 1841, all fines and forfeitures given or limited by law, in whole or in part, to the use of the State, may be recovered by indictment in the District Court, "when no other mode is expressly provided." *Hersom, pet'r*, XXXIX. 476.

114. Actions, indictments and processes pending at the time of the passage of this Act, are clearly saved from the operation of the repeal of former Acts therein specified. *Gray v. Kimball*, XLII. 299.

(e) *Act of 1856.*

115. The allegations in an indictment, that the defendant, not being licensed to sell intoxicating liquors, nor to keep an inn, did sell intoxicating liquors, and allowed the same to be drank within the place where the same was sold, which place was at the time under his control, necessarily import a violation of the Act of 1856, c. 255, § 16. *State v. Hadlock*, XLIII. 282.

### III. AGENTS AND AGENCIES TO SELL.

116. Under the Act of 1846, a license to sell liquor is of no validity if granted before the delivery, to the town treasurer, of the bond prescribed by law. *State v. Shaw*, XXXII. 570.

117. The licensing board, in absence of the clerk, chose one of the select-

men clerk, *pro tempore*, by whom a record was kept, when they issued a license:—*Held*, that the board, so composed, was not competent to issue a license. *State v. Shaw*, xxxii. 570.

118. An agent, duly appointed under the Act of 1851, whose agency continued after the Act of 1853 took effect, is subject to the limitations of the latter Act. *State v. Fairfield*, xxxvii. 517.

119. Such agent is liable to the penalty therein imposed, for selling liquors to a minor, knowing him to be such, without the written order of his parent or guardian. *State v. Fairfield*, xxxvii. 517.

120. Under the Act of 1853, the fact that one is the duly appointed agent of the town furnishes no protection against prosecutions for selling liquor, if the property and the profits of selling it are his. *State v. Putnam*, xxxviii. 296.

121. Under the Act of 1851, c. 211, neither a physician nor an apothecary was authorized to sell spirituous liquors for mixture with medicinal ingredients by the purchaser, although the medicines were purchased at the same time with the liquor, unless appointed by the town as an agent. *State v. Hall*, xxxix. 107.

122. To constitute a person an agent of a town for selling intoxicating liquors, under the Act of 1851, c. 211, it must be shown that the requisite bond has been given, and that he has received a certificate of his appointment from the proper authorities. *Foxcroft v. Crooker*, xl. 308.

123. The appointment of the plaintiff as agent of the town to sell liquors, gives him no rights in the maintenance of an action against an officer for seizing such liquors, so long as the latter, being an officer, was bound to execute the warrant, and was protected therein. *Gray v. Kimball*, xlii. 299.

## LIVERY STABLE KEEPER.

See LIEN, 36.

## LOGS AND LUMBER.

1. Logs, owned by one person, cannot be seized, libeled and sold, under R. S. of 1841, c. 67, § 9, to pay, not only the expense incurred in driving them, but also the expense of driving, at the same time, the logs owned by another person. If the owner cannot be ascertained, the *whole* of the logs, on which the expense has been incurred, is to be seized and libeled. Therefore, when different lots of logs, designated by different marks, appear by the libel to have been driven together, and a portion only appears to have been seized and libeled, without any designation of the lot, or lots, from which it was selected, to pay the whole expense, such libel is bad on demurrer. *Marsh v. Flint*, xxvii. 475.

2. So is the libel bad, if it merely allege "that the owners of said marks of logs, &c., are *unknown*," instead of, that the "owners of such logs *cannot be ascertained*." *Marsh v. Flint*, xxvii. 475.

3. So, also, if there be an omission to allege, in substance, that the libellant had caused "an inventory and appraisement of the same to be made by three disinterested persons, under oath, appointed by a justice of the peace of the same county." *Marsh v. Flint*, xxvii. 475.

4. The doctrine of "confusion of goods" may apply to mill logs, lumber, shingles, rails or ship knees. *Hesseltine v. Stockwell*, xxx. 237. *Bryant v. Ware*, xxx. 295.

5. As, when the intermixture is such that each one's property can no longer be distinguished. *Hesseltine v. Stockwell*, xxx. 237. *Bryant v. Ware*, xxx. 295.

6. When there has been a confusion of goods, the common law assigns the whole property to the innocent party, without liability to account, except in certain cases and conditions of the property. *Hesseltine v. Stockwell*, xxx. 237. *Bryant v. Ware*, xxx. 295.

7. There is no forfeiture, if the goods have been intermixed without fraud. *Hesseltine v. Stockwell*, xxx. 237. *Bryant v. Ware*, xxx. 295.

8. And, even in cases of fraudulent intermixture, there is no forfeiture, if the goods be of equal value. Each owner is entitled to his proportion of the whole. *Hesseltine v. Stockwell*, xxx. 237.

9. If logs, belonging to the plaintiff, have been wrongfully intermixed with those belonging to another person, so as to form an aggregate lot, in which the logs of the plaintiff cannot be distinguished from the others; and if a detached parcel of such aggregate lot have afterwards come into the hands of a third person, it cannot be laid down, as matter of law, that a confusion of goods has not occurred, or that the plaintiff, in order to recover against such third person in trover, is bound to prove his original ownership in any of the logs constituting such detached parcel. *Hesseltine v. Stockwell*, xxx. 237.

10. Where lumber was cut, upon two tracts of adjoining lands of different owners, by a trespasser, and the whole was so intermixed, by him or persons claiming under him, that the part belonging to each owner could not be distinguished, and the owner of one tract seized and took possession of the whole:—*Held*, that one claiming under the wrongdoer could not maintain an action of trespass against him for such taking. *Bryant v. Ware*, xxx. 295.

11. Any owner who is compelled, under R. S. of 1841, c. 67, § 9, to drive the logs of other persons, as well as his own, is bound, in selecting the time for driving, and in all other particulars in which the rights of others are involved, to exercise good faith, sound discretion and prudent management. *Foster v. Cushing*, xxxv. 60.

12. Having thus proceeded, he may recover of the others a reasonable compensation; and it is no defence that they had formed the purpose and made ample provision to drive their own logs. *Foster v. Cushing*, xxxv. 60.

13. After logs from the Penobscot Boom had been unconditionally delivered to the owner and by him sold, and to whom, among other compensations, the vendee gave a note to pay *him* the amount of the boomage, in a suit by the vendor upon the note:—*Held*, that a payment of the boomage



by the vendee to the Boom Corporation, without request of the vendor, was a voluntary act, and constituted no defence. *Huckins v. Cushing*, xxxvi. 423.

See AUCTION, &c., 1, 2.  
CONTRACT, 121.  
LIEN.

## LORD'S DAY.

1. There is no prohibition, either at common law or by statute, of the service of process, in criminal cases, on the Lord's day, except in so far as the service of the same might be unnecessary on that day. *Keith v. Tuttle*, xxviii. 326.

2. A recognizance, taken between midnight preceding, and sunset of the Lord's day, to prosecute an appeal in a criminal prosecution, is void. *State v. Suhur*, xxxiii. 539.

3. A contract thus made is also void. *Nason v. Dinsmore*, xxxiv. 391. *Hilton v. Houghton*, xxxv. 143.

4. Upon a contract dated on the Lord's day, no presumption arises that it was made before sunset; but, to render it invalid, it must be *proved* to have been made before sunset. *Nason v. Dinsmore*, xxxiv. 391.

5. So is a note, signed and *delivered* on the Lord's day, void. But, by the signing of such a note on the Lord's day, its validity is not impaired, if it be not *delivered* on that day. *Hilton v. Houghton*, xxxv. 143.

6. In a civil suit, on an issue received and discussed by the jury on Saturday, their verdict may be affirmed and recorded on the next court day, though it was finally agreed upon and sealed up on the morning of Sunday. *True v. Plumley*, xxxvi. 466.

7. The Sabbath commences at midnight preceding, and ends at sunset, on the Lord's day. Traveling after sunset, on that day, is not illegal. *Bryant v. Biddeford*, xxxix. 193.

8. It is no defence to an action for damages against a town, for injuries to plaintiff's horse, by a defect in the highway, received after sunset on the Lord's day, that the plaintiff let his horse on that day, and that, at the time of the injury, the horse was being used under such contract. *Bryant v. Biddeford*, xxxix. 193.

9. All business, traveling, and recreation, on the Lord's day, "works of necessity or charity excepted," are, under R. S. of 1841, c. 160, § 26, offences punishable by fine. *Hinchley v. Penobscot*, xlii. 89.

See WAY, 49.

## LOTTERY LANDS.

1. Under a statute of 1786, the Legislature of Massachusetts granted, by a lottery, a large number of lots in fifty townships of land in Maine. The

Act required a plan of each township, with the number of the lot drawn and of the ticket which drew it, to be inserted in a book, which should be authenticated by the signatures and seals of the managers:”—*Held*, that a copy of their proceedings, showing no such authentication, is not sufficient evidence to maintain a title under the Act. *Hovey v. Woodward*, xxxiii. 470.

2. The result is not varied by the fact that, in the public offices where the documents should be kept, no higher evidence of title to any lot under the Act can be found than that of the original, from which such a copy was taken. *Hovey v. Woodward*, xxxiii. 470.

## LUNATIC.

1. Where a lunatic, taken up in a town in which he has no legal settlement, is committed to the hospital according to the statute, the town is responsible for the expenses of his support. *Eastport v. East Machias*, xl. 280.

2. But such expenses, on due notice given, may be collected of the town in which such lunatic has a legal settlement. *Eastport v. East Machias*, xl. 280.

See INSANE PERSONS.

## MAGISTRATE.

See JUSTICE OF THE PEACE.

## MAINTENANCE.

Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right. *Palmer v. Dougherty*, xxxiii. 502.

## MALICIOUS MISCHIEF.

1. An indictment for maliciously breaking down a dam, belonging to a person named, cannot be sustained unless the ownership be proved as alleged. *State v. Weeks*, xxx. 182.

2. An indictment under the statute “of malicious mischief” may be maintained, although the facts proved might have supported an indictment for arson. *Thayer v. Boyle*, xxx. 475.

3. In such case, it is not necessary that the offender should be prosecuted *criminaliter*, prior to the commencement of a civil action by the party injured. *Thayer v. Boyle*, xxx. 475. *State v. Pike*, xxxiii. 361.

4. In such action, evidence of the general good character of the defendant is inadmissible; as is also the evidence that the plaintiff's witness was habitually intemperate. *Thayer v. Boyle*, xxx. 475.

5. In trespass for wilfully and maliciously setting fire to, &c., and destroying plaintiff's barn, &c., the jury should not decide upon the balance of testimony as in other civil cases; but the defendant is entitled to a verdict in his favor, upon merely raising a reasonable doubt. *WELLS, J.*, dissenting. *Thayer v. Boyle*, xxx. 475.

6. The knowledge of some of the inhabitants of a town that a book of the town's records was left with the defendant, is not a defence to the charge of subsequently secreting it. *State v. Williams*, xxx. 484.

7. Where one knowingly has an article belonging to another, and, being called on for it, asserts that it is not in his possession, and denies all knowledge of it, this is competent evidence in a trial against him for secreting such article. *State v. Williams*, xxx. 484.

8. And if kept openly with his own articles of the same kind, that would not necessarily determine that it was not secreted from its owners. *State v. Williams*, xxx. 484.

9. In a criminal prosecution, under R. S. of 1841, c. 162, § 13, for wilfully destroying property, the party injured may be a witness. *State v. Pike*, xxxiii. 361.

10. In such prosecution, it is immaterial whether the property came rightfully or wrongfully into possession of the defendant. *State v. Pike*, xxxiii. 361.

11. A wrongful taking is not an essential ingredient in this class of offences. *State v. Pike*, xxxiii. 361.

## MALICIOUS PROSECUTION.

1. In an action to recover damages for a malicious prosecution, the question of probable cause, upon established facts, is a question of law. *Stevens v. Fassett*, xxvii. 266. *Taylor v. Godfrey*, xxxvi. 525.

2. If one, with an honest wish to ascertain whether certain facts will authorize a criminal prosecution, lays *all* such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, which is thereupon commenced, it will go far, in the absence of other facts, to show probable cause, and to negative malice. *Stevens v. Fassett*, xxvii. 266.

3. But, if he withheld material facts, within his knowledge, or which, in the exercise of common prudence, he might have known; or, if he was influenced by passion, or desire to injure the other party; and, especially, if he received from his counsel advice of a contrary character, upon the same question, such opinion will not avail him, and cannot protect him. *Stevens v. Fassett*, xxvii. 266.

4. The elements of "probable cause" should be such as to warrant an impartial and reasonable mind, in the exercise of ordinary care and caution, in the belief of the guilt of the accused. *McGurn v. Brackett*, xxxiii. 331.

5. One may "rashly and hastily cause the arrest and prosecution of another, for a crime which has not been committed, and which, by the use of proper deliberation, care, and inquiry, he could have ascertained had not been committed," and yet have probable cause for the prosecution. *McGurn v. Brackett*, xxxiii. 331.

6. "The want of due care, and a reckless design to accomplish an object, regardless of the rights of others," do not necessarily constitute malice. *McGurn v. Brackett*, xxxiii. 331.

7. In an action for malicious prosecution, if there be no testimony that the accused committed the crime, or that the prosecutor had been informed or knew of any fact inducing a belief that he had, the law itself pronounces that there was no probable cause, and leaves nothing for the jury. *Taylor v. Godfrey*, xxxvi. 525.

8. Evidence that damages have been suffered by a malicious prosecution by defendants, without probable cause, is sufficient to support an action for conspiracy in instituting such prosecution. *Page v. Cushing*, xxxviii. 523.

9. Unlawful acts, wilfully done, are malicious as to those who are injured thereby. *Page v. Cushing*, xxxviii. 523.

10. There cannot be probable cause for a prosecution to accomplish a purpose, known by the prosecutor to be unlawful. *Page v. Cushing*, xxxviii. 523.

11. In an action for the abuse of legal process, it is unnecessary to allege or prove that it was sued out maliciously or without probable cause, or that it had terminated. *Page v. Cushing*, xxxviii. 523.

12. An act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design. *Page v. Cushing*, xxxviii. 523.

13. A. sued B. and others in trespass. "Neither party" was entered by agreement, on payment, by defendants, of a certain sum of money. B. then sued A. for malicious prosecution:—*Held*, that there was probable cause. *Marks v. Gray*, xlii. 86.

14. Information, received from a reliable source, may well be acted upon in a prosecution for a criminal offence; and it amounts to probable cause, when given positively and unequivocally. *Fitzgibbon v. Brown*, xliii. 169.

15. Probable cause does not depend entirely upon the actual state of the facts, but upon the honest and reasonable belief of the prosecutor. *Fitzgibbon v. Brown*, xliii. 169.

16. In an action for malicious prosecution, evidence of the general bad reputation of the plaintiff is admissible. *Fitzgibbon v. Brown*, xliii. 169.

## MANDAMUS.

1. The Court is authorized, both by the common law and by the statute, to issue writs of *mandamus* to courts of inferior jurisdiction, to corporations and individuals, only when necessary for the furtherance of justice and the due execution of the laws. *Smyth v. Titcomb*, xxxi. 272. *Dennett, pet'r*, xxxii. 508.

2. This process cannot be used for the review or correction of judicial errors. *Smyth v. Titcomb*, xxxi. 272.

3. On a summary hearing, upon a petition for *mandamus*, the Court will not determine the constitutionality of a law involving merely the rights of third persons. *Smyth v. Titcomb*, xxxi. 272.

4. This Court has no authority, by *mandamus*, to control the official doings of the Governor and Council. *Dennett, pet'r*, xxxii. 508.

5. To an application for a *mandamus* to the treasurer of a town to issue his warrant of distress against the collector of taxes, for neglecting to collect a school district tax, it is no defence that there were illegalities in the assessment, if the warrant was issued by legal assessors. *Tremont v. Clark*, xxxiii. 482.

6. A writ of *mandamus* will not be granted when a compliance with it will be unavailing in its effects. *Williams, pet'r*, xxxv. 345. *Woodbury, pet'r*, xl. 304.

7. *Mandamus* extends to all cases of neglect to perform a legal duty where there is no other adequate remedy. *Williams, pet'r*, xxxv. 345. *Baker v. Johnson*, xli. 15.

8. It applies to judicial as well as ministerial acts. *Williams, pet'r*, xxxv. 345.

9. If judicial, the mandate will be to the officers to exercise their official discretion or judgment, without any direction as to the *modus operandi*. *Williams, pet'r*, xxxv. 345.

10. If ministerial, the mandate will direct the specific act to be performed. *Williams, pet'r*, xxxv. 345.

11. If, in a bill of exceptions, the Judge, at *Nisi Prius*, make wrongful alterations to the injury of the excepting party, a correction cannot be had by motion, but by a writ of *mandamus*, only. *True v. Plumley*, xxxvi. 466.

12. By *mandamus*, towns may compel railroad corporations to keep in repair such bridges as the law requires them to maintain. *State v. Gorham*, xxxvii. 451.

13. Petitions for writs of *mandamus* are addressed to the judicial discretion of the Court. *Woodbury, pet'r*, xl. 304.

14. It will be denied to an applicant for this writ to place him in an office, filled by an annual election, to which he alleges he was duly chosen, but illegally counted out. *Woodbury, pet'r*, xl. 304.

15. *Mandamus* is not grantable of right, but by prerogative, and it is the absence of a specific legal remedy which gives the Court jurisdiction to dispense it. *Baker v. Johnson*, xli. 15.

16. It cannot be granted to furnish an easier or more expeditious remedy. *Baker v. Johnson*, xli. 15.

17. It will be granted, if it be *doubtful* whether there be another effectual

remedy, or if the Court does not clearly see its way to one. *Baker v. Johnson*, **XLI.** 15.

18. There ought to be, in all cases, a specific legal right, as well as a want of a specific legal remedy, in order to lay the foundation for a *mandamus*. *Baker v. Johnson*, **XLI.** 15.

19. The law gives no remedy, by action, against the county, for the pay of sheriffs, and other executive and ministerial officers, for attending Court; neither is there any specific or adequate remedy against a county treasurer, or upon his official bond, when he improperly withholds payment ordered by the Court. Under such circumstances, a *mandamus* may be sustained. *Baker v. Johnson*, **XLI.** 15.

20. The writs of *certiorari*, *prohibition*, *mandamus* and *quo warranto*, and many other processes at common law, have undergone no material change; and when they are respectively the appropriate remedies for wrongful acts and neglects, all their peculiar characteristics must be retained. *Davis, ex parte*, **XLI.** 38.

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## MANSLAUGHTER.

See MURDER.

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## MANURE.

See CONTRACT, 28.

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## MARRIAGE.

1. In dower, marriage of the demandant may be inferred from long co-habitation as husband and wife, continued until the death of the alleged husband, being received and treated as his wife, and their bringing up and educating a family of children as their own. *Carter v. Parker*, **XXVIII.** 509.

2. In all civil actions, excepting actions of *crim. con.*, general reputation and co-habitation are sufficient evidence of marriage. *Taylor v. Robinson*, **XXIX.** 323. *Pratt v. Pierce*, **XXXVI.** 448.

3. Within the import of the Massachusetts Act of 1786, prohibiting the marriage of a white person with any negro, indian or mulatto, a person but one-sixteenth of the colored blood is a white person. The marriage of such person with a mulatto was void, and the children of such marriage could not inherit their father's land. *Bailey v. Fisk*, **XXXIV.** 77.

4. In proving title to real estate by descent, a legal marriage may be established by proof of facts from which it may reasonably be inferred. *Pratt v. Pierce*, **XXXVI.** 448.

5. When the fact of a marriage is proved to have been solemnized by a settled, ordained minister of the gospel, the legal presumption is, that it was done in accordance with the law. *Pratt v. Pierce*, xxxvi. 448.

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## MARRIED WOMAN.

1. The Act of 1844, c. 117, is prospective merely, and does not affect the interest which the husband acquired in the real estate of his wife, by a marriage prior to that Act. *McLellan v. Nelson*, xxvii. 129. *Greenleaf v. Hill*, xxxi. 562.

2. Neither has that statute so altered the common law, as to enable a *feme covert* to sell her personal property without the assent of her husband. *Swift v. Luce*, xxvii. 285.

3. By the common law, a note made payable to a married woman belongs to her husband. *Greenleaf v. Hill*, xxxi. 562. *Clark v. Viles*, xxxii. 32. *Hancock Bank v. Joy*, xli. 568.

4. The party, who would establish title in a married woman, to a note made since that statute, and payable to her, must prove that it did not, in any way, come from her husband. *Clark v. Viles*, xxxii. 32.

5. When lands of a wife have been sold by an authorized agent, the money received therefor, in the hands of the agent, belongs to the husband, and, after his death, may be received by his administrator. *Crosby v. Otis*, xxxii. 256.

6. Neither at law nor in equity can the widow maintain process against the agent to recover such money. *Crosby v. Otis*, xxxii. 256.

7. The statutes enlarging the rights of married women, as to property, do not extend to rights of action for tort. *Ballard v. Russell*, xxxiii. 196.

8. Under the Act of 1844, the life estate of the husband in land owned by his wife was divested from the husband, in behalf of the wife, only upon condition that she proved the title not to have come to her from the husband after coverture. *Eldridge v. Preble*, xxxiv. 148.

9. The Acts of 1847 and 1848 were prospective only, in their operation. *Eldridge v. Preble*, xxxiv. 148.

10. The levy of an execution, against the husband, upon his life estate in the land of his wife, was not defeated by the Act of 1844, unless the wife prove that "the title did not, in any way, come from the husband during coverture." *Eldridge v. Preble*, xxxiv. 148.

11. The introduction of her title deed, from a third person, is not sufficient proof of that fact. *Eldridge v. Preble*, xxxiv. 148.

12. Neither the common law nor the statute authorizes an action on contract to be maintained against husband and wife jointly. *Davis v. Millett*, xxxiv. 429.

13. Under the recent statutes, the property in a negotiable note may pass from the husband to the wife during coverture, by his indorsement and delivery. *Motley v. Sawyer*, xxxiv. 540.

14. And after a dissolution of the marriage, she may maintain suit upon the note in her own name. *Motley v. Sawyer*, xxxiv. 540.

15. The promissory note of a married woman, being uncollectable at law, is of no value. *Howe v. Wildes*, xxxiv. 566.

16. That principle was not changed by Act of 1844. *Howe v. Wildes*, xxxiv. 566.

17. Hence, a conveyance of land to a married woman, in consideration of her promissory note, is void. And the punctual payment of the note cannot impart any new vitality to the conveyance, as against creditors. *Howe v. Wildes*, xxxiv. 566. *Brown v. Lunt*, xxxvii. 423. *Newbegin v. Langley*, xxxix. 200.

18. A married woman may maintain a suit in her own name alone, to recover possession of land belonging to her. *Webb v. Hall*, xxxv. 336.

19. Land belonging to a married woman may be conveyed by a deed, executed jointly by herself and husband. *Webb v. Hall*, xxxv. 336.

20. And if she be under twenty-one years of age, it is voidable; and she may avoid it, after coming of age, by bringing a suit for the land. *Webb v. Hall*, xxxv. 336.

21. The tenant in such suit, claiming under such deed, will not be accountable for any rents and profits which accrued prior to notice that the wife intended to avoid the deed. *Webb v. Hall*, xxxv. 336.

22. By the Act of 1847, a subsequent conveyance of land by a husband directly to his wife is made effectual to pass the title, except as against creditors. *Johnson v. Stillings*, xxxv. 427.

23. Since the Act of 1844, the right to the exclusive possession and control of property, which, at the time of the marriage, belonged to the wife, remains to her after the marriage as fully as before. *Southard v. Plummer*, xxxvi. 64.

24. Since the Act of 1847, a woman, during coverture, may acquire property by purchase in her own exclusive right. *Southard v. Piper*, xxxvi. 84.

25. The common law principle, that the income from the labor of the wife enures to the benefit of the husband, has not been impaired by the laws of the State. *Bradbury v. Andrews*, xxxvii. 199. *Merrill v. Smith*, xxxvii. 394.

26. For a married woman to "purchase" property, under the Act of 1847, she must make it from her own property, or that of others, by their consent, for her use. *Merrill v. Smith*, xxxvii. 394.

27. Property purchased by a *feme covert*, on the credit, or from the means of her husband, or by the avails of her labor, belongs to the husband. *Merrill v. Smith*, xxxvii. 394.

28. A *feme covert* may maintain an action in her own name, to protect her own property. *Davis v. Herrick*, xxxvii. 397.

29. And she may hold property, without paying for it an adequate consideration, by direct or indirect conveyance from her husband, against his subsequent creditors. *Davis v. Herrick*, xxxvii. 397.

30. And, even if the conveyance was made to defraud existing creditors, whose debts were subsequently paid. *Davis v. Herrick*, xxxvii. 397.

31. A conveyance made to a married woman, in consideration of her promissory notes, indorsed by her husband, is valid; although the indorsement was after the conveyance, if made in pursuance of an agreement when the deed was executed. *Brown v. Lunt*, xxxvii. 423.



32. Under the Act of 1821, c. 60, § 1, the reversion of a *feme covert* was liable to be levied on for her debts, contracted *before* coverture. *Moore v. Richardson*, xxxvii. 438.

33. For an injury to the property of the wife, although the control of it might have been released to her husband under the 3d section of c. 117, of the Act of 1844, the action must be brought in the name of the wife. *Colten v. Kelsey*, xxxix. 298.

34. In a suit against a married woman, upon a contract entered into by her during coverture, having a husband residing in this State, but accustomed to trade and do business as a *feme sole*, and living separate from her husband, the coverture is a perfect defence. *Fuller v. Bartlett*, xli. 241.

35. And may be proved under the general issue. *Fuller v. Bartlett*, xli. 241.

36. A wife cannot maintain an action against her husband. *Smith v. Gorman*, xli. 405.

37. If, in an action against him by his wife, he fails properly to plead the coverture in bar, he is not entitled to costs, if he prevail. *Smith v. Gorman*, xli. 405.

38. The wife of A., in his absence, having accepted a draft in her own name, the rights of the parties are to be determined by the rules of the common law, which are not affected by the statutes of this State. Such indorsement will bind the husband. *Hancock Bank v. Joy*, xli. 568.

See PAUPER, 12.

## MASTER IN CHANCERY.

See EQUITY, 60—62, 64, 70, 71. INTEREST, 8.

## MECHANIC'S LIEN.

See LIEN.

## MERGER.

Mergers are not favored in courts of law or equity. *Simonton v. Gray*, xxxiv. 50.

## MESNE PROFITS.

See REAL ACTION, 7.

## MILITIA.

1. An order from the commanding officer of a military company, addressed to a private in the company, directing him to warn the persons therein named, (his own name being on the list with the others,) to attend at a company training, is a sufficient warning to him. *Farrington v. Howard*, xxx. 235.

2. Where one, who was a captain, was deposed by the sentence of a court martial, and afterwards was prosecuted by the ensign for not performing military duty, he has a right to inquire into the legality of the proceedings of the court martial. *Crawford v. Howard*, xxx. 422.

## MILLS.

## I. RIGHTS AND LIABILITIES OF THE DIFFERENT PARTIES.

## II. FLOWAGE, AND COMPLAINTS THEREFOR.

## III. DAMAGES.

## I. RIGHTS AND LIABILITIES OF THE DIFFERENT PARTIES.

1. A grant to the defendant to have, in his own flume, (which is supplied with water from the plaintiff's dam,) "a gate of twelve inches square, or equal to that," will not justify the use, *within the flume*, of a horizontal wheel, propelled on the reaction principle, by the escape of water, through the wheel by twelve apertures, distributed over an area equal to several square feet, although the areas of all the apertures do not amount to more than twelve inches square in the aggregate. *Drummond v. Hinckley*, xxx. 433.

2. The grantee is not authorized to apply water upon a wheel revolving within the flume; nor in any way, except outside of the flume and through an orifice or orifices in the flume. *Drummond v. Hinckley*, xxx. 433.

3. Whether the amount of water can be taken through more than one orifice, *quere*; but if so, it must all be taken through a gate or space not containing a superficies of more than twelve inches square. *Drummond v. Hinckley*, xxx. 433.

4. In an action to recover plaintiff's share of the avails received by defendant, for the use of a grist-mill, in which both parties, and a third person were co-tenants, it is no defence, in whole or in part, that the defendant has incurred expense in repairs upon the mill, unless such repairs were made pursuant to R. S., 1841, c. 86. *Buck v. Spofford*, xxxi. 34.

5. The notice for calling a meeting of the mill owners must be given a reasonable time before the meeting, there being no statute prescription in this particular. *Buck v. Spofford*, xxxi. 34.

6. The decision of the mill owners need not be by vote, neither is any record of it necessary. *Buck v. Spofford*, xxxi. 34.

7. The law will justify no repair, whereby to charge one part owner against his consent, except so far as to make the property serviceable. *Buck v. Spofford*, xxxi. 34.

8. But, if repairs have been made under the statute beyond what was necessary, his lien will be good for such part of them as were necessary. And if he has been reimbursed to that extent, out of the joint profits, he will be accountable, in assumption, to his co-tenant, for his share of the surplus, if any. *Buck v. Spofford*, xxxi. 34.

9. In such an action, by one co-tenant against the other, the defendant, in order to prove the legality of the mill owners' meeting, may use another of the co-tenants as a witness. *Buck v. Spofford*, xxxi. 34.

10. Damages are recoverable for an injury to a mill, lawfully existing, occasioned by the erection of any dam, unless the right to maintain such mill shall have been lost or defeated. *Thomas v. Hill*, xxxi. 252.

11. The grant of a "mill site" conveys a water power, together with the right to maintain a dam wherever such dam would be suitable for the convenient and beneficial appropriation of the water power. *Stackpole v. Curtis*, xxxii. 383.

12. To establish a prescriptive right of flowing water, by a dam, for the use of a mill, it is not necessary that the dam should have been maintained, for the whole period, upon the same spot; it is sufficient, if it has been maintained upon the same mill site, though removed, from time to time, to different places upon such site. *Stackpole v. Curtis*, xxxii. 383.

13. A right, acquired by use, to maintain a dam, unimpeded by any dam below it on the same stream, may be lost by non-user. *Farrar v. Cooper*, xxxiv. 394.

14. Though, from the time of ceasing to use a mill privilege, twenty years may not have elapsed prior to its being overflowed and destroyed by a dam below, still an abandonment of the privilege may be presumed, if its proprietor, witnessing the erection of the dam and of expensive works upon it, and knowing that it must destroy his privilege above, makes no effort or remonstrance to prevent it, or claim of remuneration for it, within the residue of the twenty years. *Farrar v. Cooper*, xxxiv. 394.

15. The statute, giving protection to mill-dams, extends only to such streams as are not navigable. *Bryant v. Glidden*, xxxvi. 36. *Knox v. Chaloner*, xlii. 150.

16. Where the plaintiff's grantor, being owner of a water privilege, conveyed to the defendant one-half the flume connected with the grist-mill, with the privilege of drawing water from the mill-dam to carry certain machinery when the water was not needed for the grist-mill: — *Held*, that the plaintiffs were restricted to the use of the same power required to drive the grist-mill at the time of the defendant's grant, if necessary to the enjoyment of his rights; that they might use another kind of wheel or wheels, but no more water in quantity could be used or lost through the newly constructed wheels than was required for the use of the mill, at the time of the grant. *Davis v. Muncey*, xxxviii. 90.

17. But the plaintiff's right to recover damages of defendant, for using the water when wanted for the grist-mill, and while the water was running over the dam, cannot be defeated, by showing leakage in another flume connected with the same head, but not connected with the grist-mill flume, although one of the plaintiffs had actual control over it. *Davis v. Muncey*, xxxviii. 90.

18. A parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control

the water raised by means of it. *Pitman v. Poor*, xxxviii. 237. *Moulton v. Faught*, xli. 298.

19. Nor can the owner of such reservoir dam use the water raised thereby, for a mill subsequently erected, to the detriment of the earlier mill, for the reason that it was the oldest dam. *Pitman v. Poor*, xxxviii. 237.

20. In regard to the owner of the soil, it may be considered as erected when he first appropriated it to his own use. *Pitman v. Poor*, xxxviii. 237.

21. The owner of the first mill is entitled to the beneficial use of the water, as though no reservoir dam existed. *Pitman v. Poor*, xxxviii. 237.

22. The owner of a mill, erected subsequently to one lawfully existing upon the same stream, is liable in damages, if, by his mode of using the water, the first mill is rendered less beneficial and profitable than it was before. *Wentworth v. Poor*, xxxviii. 243.

23. And this liability is not lessened although the damages arise from the use of improved machinery by the owner of the second mill. *Wentworth v. Poor*, xxxviii. 243.

24. The authority to flow lands by maintaining a water-mill, under the mill Act, if it were a new question, might well be doubted, as conflicting with Art. 1, § 21, of the Constitution. *Jordan v. Woodward*, xl. 317.

25. From its great antiquity, and the long acquiescence in its provisions, it must be deemed to be the settled law of the State. Yet its peculiar provisions cannot be further extended by implication. *Jordan v. Woodward*, xl. 317.

26. Hence, the riparian proprietor of lands overflowed by means of a dam, may occupy the land so overflowed, by erecting piers thereon and constructing booms, and thereby exclude the mill-owner from making it a depository of lumber for his mills. *Jordan v. Woodward*, xl. 317.

27. In an action by A., owner of a saw-mill, to recover damages of B., alleged owner or occupant of another mill, situated on the opposite side of the same river, and supplied with water from the same source, for diverting water from the mill of A., the ownership or actual occupancy of B. must be proved, or the suit cannot be maintained. *Sidelinger v. Hagar*, xli. 415.

28. Such ownership is not established by a deed to the defendants, from a party not shown by the evidence to have had the title in him, while it does appear, that a third party has an older, and, apparently, perfect outstanding title; and the presumption, in the absence of proof, in such case, is, that the possession follows the superior title. *Sidelinger v. Hagar*, xli. 415.

29. The Court cannot presume, that he, who assumes to convey as owner, is such in fact, or undertake to supply a link in the chain of title, the existence of which is rendered probable, but is not in the case. *Sidelinger v. Hagar*, xli. 415.

30. The mill Act of R. S. of 1841, c. 126, is subject to the paramount right of passage of the public, across and upon streams, in all cases where the streams in their natural state are capable of floating boats or logs. *Know v. Chaloner*, xlii. 150. *Treat v. Lord*, xlii. 552.

## II. FLOWAGE, AND COMPLAINTS THEREFOR.

31. By our statute, the remedy for damages occasioned by flowage is abolished, except under particular circumstances. *Hill v. Baker*, xxviii. 9. *Monmouth v. Gardiner*, xxxv. 247. *Underwood v. North Wayne Scythe Co.*, xli. 291.

32. All the owners of the dam complained of must be joined in the complaint, or it will abate, if the non-joinder be pleaded. *Hill v. Baker*, xxviii. 9.

33. A lease of so much land adjoining a stream, as shall be necessary and convenient for making and using a canal to "slip lumber" from an upper to a lower pond, does not by implication grant any right to flow the lessor's land by the erection of a dam. *Davis v. Brigham*, xxix. 391.

34. A complaint for flowing will lie against the occupant, as really as against the owner, of a dam. *Davis v. Brigham*, xxix. 391.

35. A right to flow lands for a mill may be acquired by prescription, although the flowing was occasioned by different dams, owned by different persons. *Davis v. Brigham*, xxix. 391.

36. To establish a right by user, to flow complainant's land, in a case where the defendant's proof showed that the only interruption to the flowing was during the rebuilding or repairing of the dam, it must be proved, that damage was done thereby to the owner; that it must have been such as would enable him to maintain a process to prevent such flowing, or to recover for it; that it should be of yearly occurrence; that he knew or had the means of knowing of such flowing; that it must have been continued for twenty years, and, for that period, it was flowed as high or higher than during the three years next before filing the complaint, with the qualification, however, that the omission to flow during the rebuilding or repairing of the dam should not prevent the acquisition of such right. *Wood v. Kelley*, xxx. 47. *Underwood v. North Wayne Scythe Co.*, xli. 291.

37. In a complaint for flowing, one of the respondents, after having been defaulted, cannot be a witness for his co-defendant. *Wood v. Kelley*, xxx. 47.

38. Where a judgment for yearly damages has been recovered, it is a charge upon the estate complained of; and the owner or occupier of the mill and dam is liable in debt, not only for what may fall due while he is owner, but for all that was in arrear before his title commenced. *Knapp v. Clark*, xxx. 244.

39. In an action on such judgment, an amendment, stating the time and mode of the acquirement of defendant's title, (it having been already alleged that the defendant owned and occupied the same,) introduces no new cause of action. *Knapp v. Clark*, xxx. 244.

40. In a complaint for flowing land, claimed to be the complainant's, it is to be so considered, if the defendant does not controvert it. *Benson v. Soule*, xxxii. 39.

41. Though a dam may have flowed land more than twenty years, a prescriptive right, set up by the defendant, is not established, unless the occupation was by himself or some one under whom he claims. *Benson v. Soule*, xxxii. 39.

42. Flowing, occasioned by a reservoir dam, distant from the mill, will not support a complaint, alleging the flowing to be occasioned by the dam at the

mill, though the former is maintained merely to supply water for the mill. *Whitney v. Gilman*, xxxiii. 273.

43. Such complaint may be amended, on terms, however. *Whitney v. Gilman*, xxxiii. 273.

44. To a complaint for flowing, against the owner of a dam, it is no defence that his ownership had ceased prior to the instituting of the complaint. *Bean v. Hinman*, xxxiii. 480.

45. For damage done within three years before commencing the suit, and before he had ceased to own the dam, he is responsible. *Bean v. Hinman*, xxxiii. 480.

46. Under the statute, a right by prescription to flow land to a given height, by means of a mill-dam, cannot be sustained, unless the flowing had caused damage to the owner of the land. *Wentworth v. Sanford Manuf'g Co.*, xxxiii. 547. *Underwood v. North Wayne Scythe Co.*, xli. 291. *Prescott v. Curtis*, xlii. 64.

47. A remedy lies in favor of a town for damages sustained by flowing the banks of its public highway, by means of a mill-dam, though the owner of the dam may have obtained the permission of the proprietor to flow the land; and though the town, at a reasonable expense, might have prevented the damage; and though other causes, jointly with the dam, contributed to occasion the damage; and though the dam was not the principal cause of it. *Monmouth v. Gardiner*, xxxv. 247.

48. When such an action, commenced in the District Court, came by appeal to this Court, and the verdict was less than twenty dollars, full costs must be allowed the plaintiffs. *Monmouth v. Gardiner*, xxxv. 247.

49. A complaint for flowing land, by means of a mill-dam, should allege it to have been erected on a stream not navigable. *Bryant v. Glidden*, xxxvi. 36.

50. The omission of such an allegation should be taken advantage of before verdict, as no arrest of judgment can be allowed in a civil suit. *Bryant v. Glidden*, xxxvi. 36.

51. Though such a defect might have proved fatal, if seasonably objected to, a writ of *certiorari* would not be granted, probably, if, in point of fact, the stream was not a navigable one. *Bryant v. Glidden*, xxxvi. 36.

52. Upon the return of the commissioners' report, the case is to be tried by jury in Court, at the request of either party. Upon this trial, the report is to "be given in evidence, subject to be impeached by evidence from either party." *Bryant v. Glidden*, xxxvi. 36.

53. Such report is conclusive until impeached. And it can be impeached only by showing partiality, bias, prejudice or inattention to, or unfaithfulness in, the discharge of the trust; or that it was based upon such error that the existence of such influences may be justly inferred from the extraordinary character or grossness of that error. *Bryant v. Glidden*, xxxvi. 36.

54. The verdict, after the report has been returned, is defective, if it do not find the yearly damage; or "what portion of the year the land ought not to be flowed;" or if it assess, in one aggregate sum, the damage which accrued before, and also that which accrued after, the complaint was filed. And, unless the verdict finds the two former points, no judgment can be rendered, and a new trial must be granted. *Bryant v. Glidden*, xxxvi. 36.

55. A subsequent purchaser of the dam will be liable for the yearly dam-

age, upon the expiration of each year, reckoning from the filing of the complaint. *Bryant v. Glidden*, xxxvi. 36.

56. In a complaint for flowing land, owned by tenants in common, by means of a mill-dam, all the co-tenants must join, or the process cannot be maintained. *Tucker v. Campbell*, xxxvi. 346.

57. To entitle the owners of a dam and mill to the benefits of c. 126, R. S. of 1841, the mill, as well as the dam, must be situated within the limits of the State. *Wooster v. G. F. Manuf'g Co.*, xxxix. 246.

58. But, where the mill is situated in another State, across a river, the boundary of the two States, they may maintain an action for indemnity at common law. *Wooster v. G. F. Manuf'g Co.*, xxxix. 246.

59. In the trial of a complaint for flowing lands by means of a mill-dam, after the commissioners have reported the damages, such commissioners cannot be interrogated whether they exercised great care in their proceedings, and in arriving at their conclusion. *Bryant v. Glidden*, xxxix. 458.

60. Where such report is impeached by the verdict, merely showing that the verdict is erroneous is not sufficient cause to set it aside; but it must appear that the jury acted under improper influences, or were affected by some bias, or misconceived some of the essential facts of the case. *Bryant v. Glidden*, xxxix. 458.

61. If the owner of land, flowed by means of a mill-dam, has not been injured thereby, he cannot maintain an action therefor under the statute; and, in such case, no prescriptive right to flow, without the payment of damages, can be acquired. *Underwood v. North Wayne Scythe Co.*, xli. 291.

62. But, if he has been injured, so as to enable him to maintain a complaint against the owner of the mill, such prescriptive right may be acquired. *Underwood v. North Wayne Scythe Co.*, xli. 291.

63. In order to maintain such prescriptive right, it must be shown that the flowing for the twenty years and upwards has been an injury to the owner of the land. *Underwood v. North Wayne Scythe Co.*, xli. 291.

64. The exposition by this Court, in its various decisions, of the statutes of 1821, 1824 and 1840, on the subject of flowing lands by the operation of mills, is correct in the doctrines established, although remarks may have been made, in reference to particular facts of the respective cases, probably not understood in some respects as they were intended. *Underwood v. North Wayne Scythe Co.*, xli. 291.

65. A complaint under R. S. of 1841, c. 126, § 6, need not contain an allegation that the lands were overflowed by reason of the head of water made necessary for the mills of the respondents; nor that the respondents built their dams and mills upon their own land, or upon the land of another with his consent. *Prescott v. Curtis*, xlii. 64.

66. The respondent cannot plead in bar, that the land is not injured by the dam; but he may plead any other matter which may show that the complainant cannot maintain the suit. *Prescott v. Curtis*, xlii. 64.

67. The issue, whether he has suffered injury or not, must first be made before the commissioners; and if their report be impeached, then this question, with others, if they exist, may be regularly presented to a jury. And the issue presented by a plea in bar, that the lands were not overflowed by reason of the head of water raised by the dam, is virtually the issue, whether the complainant has or not suffered injury. *Prescott v. Curtis*, xlii. 64.

68. A plea by respondents, that they had flowed the lands more than twenty years prior to complaint, doing the same damage, if any, as during the period covered by the complaint, is peculiar, and embraces an issue to be tried by the commissioners in the first instance. *Prescott v. Curtis*, XLII. 64.

69. For a legal complaint under this Act, see *Prescott v. Curtis*, XLII. 64.

See AMENDMENT, 9.

### III. DAMAGES.

70. Upon complaint for flowing, it is competent for the jury to include compensation for injury to plaintiff's fences, and for the annual expense of maintaining fences for the future. *Jones v. Phillips*, XXX. 455.

71. The statute does not authorize a recovery for damage done by flowing more than three years before the complaint. *Jones v. Phillips*, XXX. 455.

72. Whether a prescriptive right to flow land to a given height can be proved, in order to reduce the damage occasioned by the dam when elevated above that height, *quere*. *Wentworth v. Sanford Manuf'g Co.*, XXXIII. 547.

73. In a complaint for flowing land, damages can only be awarded for the effects of the dam described in the complaint. Damages arising from other dams, although auxiliary to the one complained of, cannot be considered by the jury. *Underwood v. North Wayne Scythe Co.*, XXXVIII. 75.

74. Damages form the basis of the complaint for flowing, but the question of injury or no injury is not an issue to be made and tried in court, before the appointment of commissioners. *Underwood v. North Wayne Scythe Co.*, XLI. 291.

75. The power given to the jury by the statute of Massachusetts, of Feb. 28, 1798, to try the issue on the complaint as to damages, was abrogated by the statute of 1821, c. 45, and given to the commissioners. *Underwood v. North Wayne Scythe Co.*, XLI. 291.

### MINISTERIAL FUND.

1. Property, held by a religious society as a ministerial fund, is to be assessed to the treasurer. *Hunt v. Perley*, XXXIV. 29.

2. A fund was vested in a board of trustees, under charge that its interest should be annually paid to support a minister, of certain specified qualifications, stately preaching in a house of public worship to be located in a prescribed portion of the town, which, together with another portion of the town, was afterwards incorporated into a parish, and the parish settled a minister who stately preached in a house of public worship in the prescribed locality: *Held*, that the fund in the hands of the trustees was not property held by the parish as a ministerial fund; and that the treasurer of the board is not, *ex officio*, the treasurer of the parish; and that taxes upon the fund cannot be assessed to him. *Hunt v. Perley*, XXXIV. 29.



## MINOR.

1. A minor son, allowed by his father to leave him and work for his own support, and make contracts for himself without interference, may acquire and hold property in his own right, and maintain actions at law respecting it, although he has never been emancipated. *Boobier v. Boobier*, xxxix. 406.

2. Minors, under the age of fourteen years, may be bound as apprentices until that age, without their consent, by their father, if living; and if not, by their mother or legal guardian; and above that age in the same manner, with their consent. *Whitmore v. Whitcomb*, xliii. 458.

3. The indentures should be made by the father or mother, the minor, if above the age of fourteen years, consenting; and not by the latter with the consent of the former. *Whitmore v. Whitcomb*, xliii. 458.

See INFANT.

PAUPER, 41.

## MISDEMEANOR.

See FELONY, 3, 4. INDICTMENT, 7, 9.

## MISNOMER.

See ABATEMENT, 14. LAW AND FACT, 23. TRESPASS, 12.

## MITTIMUS.

In a mittimus, it is not necessary to copy the complaint, or state the proofs before the justice. *Ricker, pet'r*, xxxii. 37.

## MORTGAGE.

- I. WHAT CONSTITUTES A MORTGAGE.
- II. RIGHTS AND INTERESTS OF THE PARTIES.
- III. TRANSFER OF RIGHTS IN MORTGAGED ESTATES.
- IV. DISCHARGE OR EXTINGUISHMENT OF A MORTGAGE.
- V. REDEMPTION.
- VI. FORECLOSURE.
- VII. ACTIONS AT LAW, AND JUDGMENTS THEREON.
- VIII. MORTGAGE OF CHATTELS.

## I. WHAT CONSTITUTES A MORTGAGE.

1. Where the owners of an unfinished vessel, on the stocks, agree in writing to "finish and fit it ready for sea with all reasonable dispatch," &c., and "have granted, bargained and sold unto" certain persons named, "one-third part of said vessel, for and in consideration of one dollar, the receipt whereof is acknowledged;" and then stipulate that the condition of this agreement is, that "the vendees named "shall pay unto" the owners, \$3000, (one-half in cash and one-half in six month's notes,) when said vessel shall have been launched five days and clear of lien claims. "And" the owners, "on the payment of said \$3000, make and convey a clear bill of sale of one-third part of said vessel," &c.; — *Held*, that the agreement was an executory contract for a future purchase and sale of one-third of the vessel, and not a contract, by which that part was then purchased and sold, either absolutely or conditionally, or in mortgage. *Metcalf v. Taylor*, xxxvi. 28.

2. When a bill, answer and proof, each shows that a deed of conveyance, though absolute in its form, was intended merely to secure a debt or to indemnify against liabilities, it will be treated, in equity, as a mortgage. *Howe v. Russell*, xxxvi. 115.

3. A deed of land and bond for re-conveyance, on conditions, executed at the same time, constitute a mortgage. *McLaughlin v. Shepherd*, xxxii. 143. *Purrrington v. Pierce*, xxxviii. 447.

4. An offer to perform the conditions defeats the conveyance. *McLaughlin v. Shepherd*, xxxii. 143.

5. But the bond must be recorded, to become operative as against subsequent purchasers, unless they are chargeable with notice. *McLaughlin v. Shepherd*, xxxii. 143. *Purrrington v. Pierce*, xxxviii. 447.

6. An obligation under seal, given by the grantee of real estate at the time of his deed, to re-convey on the payment of a certain sum of money, operates as a deed of defeasance between the parties, though not recorded; and, in an action by such grantee to recover the premises after the forfeiture of the obligation, he will be entitled to a conditional judgment only, but for no rents. *Jackson v. Ford*, xl. 381. *Shaw v. Erskine*, xliii. 371. *Mills v. Darling*, xliii. 565.

7. A conveyance, by husband and wife, of real estate belonging to the wife, and a bond to re-convey, given to the wife alone, constitute a mortgage; although the wife gave no personal security for the money to be paid as specified in the bond. *Mills v. Darling*, xliii. 565.

8. A defeasance is a collateral deed, and, to be valid, must be made between the same persons who were parties to the first deed, and not prior in point of time. *Shaw v. Erskine*, xliii. 371.

## II. RIGHTS AND INTERESTS OF THE PARTIES.

9. Rules of law respecting fraudulent conveyances, are applicable to mortgages. *Aiken v. Kilbourne*, xxvii. 252.

10. Where the only condition of a mortgage was, that the mortgager should "support the said" mortgagee "with suitable meat and drink, and all necessaries, and pay all doctor's bills," &c.; and where an agreement, under seal, was made between the parties, at the same time, containing stipulations on the part of each, whereby it appeared that the mortgagee should reside upon

the premises, in order to be entitled to her support:—*Held*, that the condition of the mortgage could not be limited by the terms of the agreement. *Allen v. Parker*, xxvii. 531.

11. Where a mortgage was made by a husband and wife, of four separate parcels of land, of which three were the property of the wife, and the other of the husband, to secure a debt before due from him; and where an entry for condition broken was made by an attorney of the mortgagee, by entering upon one of the parcels belonging to the wife, having in his possession the mortgage deed, and stating in the presence and hearing of the husband and of two witnesses, that "he entered for condition broken;" and where afterwards there was a waiver of the entry thus made, by the mortgagee; and where, after the expiration of three years from the time of such entry, the mortgagee, with the assent and at the request of the husband, but without the knowledge of the wife, made a quitclaim deed of the premises to the demandant, he, however not being present at the time, wherein it was said, "do hereby remise, release, bargain, sell and convey and forever quitclaim unto said (demandant,) the land described in said mortgage, entry having been made to foreclose, and the right of redemption having expired, and the said (demandant) having, at said (husband's) request, paid the amount which would be due on said mortgage. This release is made to said (demandant) at the request of said (mortgagors) and is intended to discharge all title acquired by said (mortgagee):"—*Held*, in a real action, brought by the grantee of the mortgagee against the male mortgager, that, as between them, the demandant was entitled to recover. TENNEY, J., dissenting. *Rangely v. Spring*, xxviii. 127.

12. If a mortgager of a mill, (after making the mortgage,) put into it a shingle-mill and apparatus, it becomes a part of the freehold and passes to the mortgagee after foreclosure. *Corliss v. McLagin*, xxix. 115.

13. Notes secured by a mortgage, void as to creditors, are valid in the hands of one to whom they have been indorsed and assigned without knowledge of the fraud; but, if indorsed when over due, they are subject to equities to the same extent as if not thus secured. *Sprague v. Graham*, xxix. 160.

14. When the condition of a mortgage has been performed, it cannot be set up to defeat the title of the mortgager. *Chadbourne v. Rackliff*, xxx. 354.

15. An assignment of a satisfied mortgage conveys no interest in the estate. *Chadbourne v. Rackliff*, xxx. 354.

16. If the mortgagee enter upon the premises, and require the mortgager's tenant at will to attorn to him, or surrender to him the possession, the tenancy is determined. And if the tenant refuse to attorn or quit, the mortgagee may maintain trespass against him for subsequently accruing rents. *Hill v. Jordan*, xxx. 367.

17. Mortgagees, or their assignees, hold the mortgaged property, for the benefit of the owners of the debts secured by the mortgage. *Johnson v. Candage*, xxxi. 28. *Moore v. Ware*, xxxviii. 496.

18. And such owners are entitled, at equity, to recover their proportionate part of the mortgaged property, and of its rents and profits, of him who perfected the foreclosure. *Johnson v. Candage*, xxxi. 28.

19. Where a mortgage is made to secure a claim, void by statute, and a subsequent mortgage is made to another person, to secure a lawful debt, the receiving of the money by the first mortgagee, to discharge his mortgage, will

not subject him to an action by the subsequent mortgagee, to recover the money, there being no privity. *Ellsworth v. Mitchell*, xxxi. 247.

20. Lapse of time furnishes no presumption, that a debt, secured by a mortgage, has been paid, if the possession has been constantly in the mortgagee. *Crooker v. Jewell*, xxxi. 306. *Sweetser v. Lowell*, xxxiii. 446.

21. One holding under a warranty deed from a mortgager, has a right, in a suit against him by the mortgagee, to prove the payment made by the mortgager, by which the land was relieved from the mortgage. *Williams v. Thurlow*, xxxi. 392.

22. If one purchases land, (from one who had previously conveyed the same in mortgage,) and then sells the same at different times, in separate parcels, to several purchasers, it may be, that, in equity, the portion last conveyed, if of sufficient value, will be chargeable with the whole mortgage debt. *Sheperd v. Adams*, xxxii. 63.

23. In this case, it was of sufficient value; and the purchaser thereof bought in the mortgage debt, took an assignment of the mortgage and foreclosed it. He then, under a claim of title to the whole tract, released to the purchaser of the first sold portion his (assignee's) right in this portion, upon being paid a sum of money:—*Held*, that said releasee, in an action at law against the releasor, could not recover back the money, though paid under a belief that the releasor had title to the whole tract. But, that whatever his right may be, his remedy is in equity alone. *Sheperd v. Adams*, xxxii. 63.

24. If a mortgage be made, in fraud of creditors, and the mortgager afterwards become a bankrupt, the purchaser of the assignee's rights holds the fee, unincumbered by the mortgage. *Dwinel v. Perley*, xxxii. 197.

25. A mortgager, whose right of redeeming has been sold on execution, has no rights in the land, until redeemed; and his acts upon it may be treated as trespass. *Smith v. Sweetser*, xxxii. 246.

26. Before redemption, whether he be in possession or not, he cannot maintain trespass *quare clausum*, against the purchaser for acts done upon the land. *Smith v. Sweetser*, xxxii. 246.

27. In a mortgage, made to the husband alone, to secure a bond for the maintenance of himself and wife, she has a sustainable interest. *Pike v. Collins*, xxxiii. 38.

28. After the death of the husband, and a foreclosure of the mortgage by the administrator, the administrator, and those holding under him by the purchase, hold the land, charged with the maintenance of the widow, in proportion to the value of their respective parts. The liability of such holders commences from the time of their respective purchases. *Pike v. Collins*, xxxiii. 38.

29. Where a registered mortgage deed of land mentions the bond secured thereby, without specifying its contents, subsequent purchasers are chargeable with notice of its provisions. *Pike v. Collins*, xxxiii. 38.

30. The possession of land by the mortgager, though continued for more than twenty years, is not to be regarded as adverse to the mortgagee, while the debt remains unpaid. *Sweetser v. Lowell*, xxxiii. 446.

31. The sum to be paid to a widow, for the release of her dower in mortgaged real estate, is the present worth of an annuity during her life, equal to the net annual value of such estate. *Simonton v. Gray*, xxxiv. 50.

32. A town or city tax cannot lawfully be assessed to the mortgagee of land, not in possession, and who has never entered to foreclose. *Coombs v. Warren*, xxxiv. 89.

33. While the mortgager is in possession, it is his duty to pay the taxes upon the land. *Williams v. Hilton*, xxxv. 547.

34. The grantor and grantee of land by a deed in form of warranty, but by legal intendment merely an equitable mortgage, may be compelled in equity, after the discharge of the mortgage, to release the estate to a person who had derived, under the grantor, a title legally subordinated only to such mortgage. *Howe v. Russell*, xxxvi. 115.

35. The holder of a personal claim, with a mortgage of land as collateral, may recover the balance due on the debt, in a suit at law, after foreclosure, deducting the value of the land at the time of the foreclosure. *Porter v. Pillsbury*, xxxvi. 278.

36. A mortgagee of land, even before condition broken, may take the same into possession, if he have made no stipulation to the contrary. *Allen v. Bicknell*, xxxvi. 436.

37. Even if he enter forcibly, and under circumstances which might render him liable for a breach of the peace, such entry will be rightful against the mortgager; and he may retain the rents and profits equally, as if his entry had been peaceable and under legal process. *Allen v. Bicknell*, xxxvi. 436.

38. If the mortgager have personal property upon the land, the mortgagee, in order to perfect his entry, may remove the same, upon the mortgager's neglect, after reasonable notice, provided the removal be made in a careful manner, and to a safe and convenient place. *Allen v. Bicknell*, xxxvi. 436.

39. Where a person takes a mortgage to secure advances and credits, to be made to the mortgager within a time limited therein, no advances or credits after the time so limited will be secured by that mortgage. *Miller v. Whittier*, xxxvi. 577.

40. The mortgage is in itself notice to the assignee of the trust chargeable upon it, notwithstanding he may not know to whom the other notes have been assigned. *Moore v. Ware*, xxxviii. 496.

41. If, after an attachment of an equity of redemption, the mortgager convey the premises by an absolute deed, for the consideration of the notes secured by the mortgage and other land, such grantee cannot hold the estate, which may be duly levied on by virtue of the attachment, against such attaching creditor of the mortgager. *Whitcomb v. Simpson*, xxxix. 21.

42. Such attachment is available only by levy. *Whitcomb v. Simpson*, xxxix. 21.

43. And no fraudulent intent, in the creditor making the attachment, will authorize the original mortgagee to revive his title under the mortgage, after it has been once canceled. *Whitcomb v. Simpson*, xxxix. 21.

44. A mortgagee in possession, for condition broken, cannot be dispossessed thereof by the mortgager, in a suit at law, even after payment of the mortgage debt. The remedy is in equity. *Wilson v. Ring*, xl. 116. *Hill v. More*, xl. 515.

45. A mortgagee of a vessel, who gives an accountable receipt therefor to an officer attaching it as the property of the mortgager, cannot avoid his liability by showing that his claims exceeded the value of the vessel. *Drew v. Livermore*, xl. 266.

46. A mortgager in possession may maintain trover against a stranger who

cuts trees upon his premises and carries them away. *Whidden v. Seelye*, **XL**. 247.

47. And, in an action on such receipt, he is precluded from showing any informality or invalidity in the attachment or judgment, while the latter is in force. *Drew v. Livermore*, **XL**. 266.

48. Where a mortgagee advertises to sell and convey the mortgaged property, "to the full extent of the powers derived to or by him under and by virtue of said deed, and not otherwise," he proposes only to exercise a legal right; and if his deed does not authorize him to sell, then he can convey nothing, and no injury could be sustained by the mortgagers. *Y. & C. R. R. Co. v. Myers*, **XLI**. 109.

49. If a mortgager suffer a sale of the mortgaged premises in his presence, under a reasonable misapprehension that there had been a foreclosure, and that his right of redemption had expired, he does not thereby lose his rights. *Dixfield v. Newton*, **XLI**. 221.

50. L., upon dissolution of a co-partnership with A., received, as the consideration for his interest in the concern, the notes of the latter, with a mortgage on the late co-partnership property, "to secure L. for his liability on the partnership debts, for his liability to pay any other debts of A., and for the ultimate payment of the notes." Afterwards, the property was sold, with the consent of the mortgagee, and a portion of the proceeds came into his hands, with which he paid the co-partnership liabilities: — *Held*, that the avails of the property were to be appropriated, *first*, to indemnify the mortgagee against his company liabilities, and, *then*, the balance should be applied to the notes. *Low v. Allen*, **XLI**. 248.

51. The lien of a mortgagee attaches equally for the debt and for the costs necessarily incurred in the enforcement of his rights. *Hurd v. Coleman*, **XLII**. 182.

52. An assignee of a mortgage and the notes secured thereby may prosecute suits pending thereon, in the name of the assignor, to final judgment, for his own benefit, and derive all the resulting rights that would have accrued to the assignor. *Hurd v. Coleman*, **XLII**. 182.

### III. TRANSFER OF RIGHTS IN MORTGAGED ESTATES.

- (a) BY CONTRACT.
- (b) UNDER LEGAL PROCESS.
- (c) GENERALLY.

#### (a) *By contract.*

53. The interest of a mortgagee cannot pass at law, to a third person, without an assignment, in some form, under seal, although the contract secured by the mortgage has been assigned by writing without seal. *Smith v. Kelley*, **XXVII**. 237. *Dwinnel v. Perley*, **XXXII**. 197.

54. A mortgagee's interest, after entry to foreclose, may be conveyed by warranty deed. *Lincoln v. White*, **XXX**. 291. *Hill v. More*, **XL**. 515.

55. A quitclaim deed, purporting to convey lands, may operate as an assignment of a mortgage of them. *Crooker v. Jewell*, **XXXI**. 306. *Dixfield v. Newton*, **XLI**. 221.

56. By the Act of 1789, an administrator of a mortgagee had authority to assign the mortgage. *Crooker v. Jewell*, **XXXI**. 306.

57. At law, the transfer of the note, secured by a mortgage, does not assign the mortgage. *Dwinel v. Perley*, xxxii. 197.

58. Where a mortgage was given to secure the performance of a bond, conditioned for the support of the obligee and wife, and the mortgagee entered for breach of condition of the mortgage and for foreclosure; and a few months afterwards conveyed the mortgaged property to the tenant, by an absolute deed, with covenants of general warranty, but retaining the bond himself, and took from the tenant a new bond, conditioned for the support of himself and wife, and a new mortgage from the tenant to secure the fulfilment of said new bond:—*Held*,—

1st. That said warranty deed conveyed all the right which the mortgagee had in the property mortgaged, to wit: a conditional fee with legal possession, and also an *equitable* right to the original bond; and—

2d. That said warranty deed did not interrupt the proceedings for foreclosure. *Hill v. More*, xl. 515.

59. A quitclaim deed by a mortgagee, and the delivery of the notes secured by the mortgagee, to those to whom the deed is made, operate as an assignment of the mortgage. *Dixfield v. Newton*, xli. 221.

#### (b) *Under legal process.*

60. The interest of a mortgagee in land, prior to foreclosure, is not attachable. *Lincoln v. White*, xxx. 291. *McLaughlin v. Shepherd*, xxxii. 143.

61. Nor subject to a levy as his property. *McLaughlin v. Shepherd*, xxxii. 143. *Coombs v. Warren*, xxxiv. 89. *Randall v. Farnham*, xxxvi. 86.

#### (c) *Generally.*

62. Where a mortgage of lands, of which the mortgager has no recorded title, is made (and duly recorded,) to him who is the absolute owner thereof by the records, and the mortgagee assigns to another "all his right, title and interest in and to the within mortgaged premises," and this assignment is also recorded, such record must be regarded as notice of such assignment, to after attaching creditors and purchasers of the mortgagee. *Pierce v. Odlin*, xxvii. 341.

63. And such mortgagee, making such assignment, and those claiming under him, as after attaching creditors and purchasers, are estopped to deny the title of the assignee by virtue of the mortgage. *Pierce v. Odlin*, xxvii. 341.

64. If the purchaser had notice of an existing unrecorded mortgage, as between him and the mortgagee, it is the same as if it had been recorded. *Copeland v. Copeland*, xxviii. 525.

### IV. DISCHARGE AND EXTINGUISHMENT OF A MORTGAGE.

65. The holder of an equity of redemption paid the amount secured by a mortgage, without disclosing any intention of keeping the mortgage in force, or taking any assignment of the same. Years afterwards, the mortgagee assigned the mortgage and notes to the holder of the equity, so paying the

notes:—*Held*, that the mortgage was discharged. *Given v. Marr*, xxvii. 212.

66. A mortgage has, for its basis, the contract, the obligation of which is intended to be secured; and it ceases to have validity by the discharge of that contract. *Patch v. King*, xxix. 448.

67. The parties may annul the collateral security without affecting the debt. *Patch v. King*, xxix. 448.

68. A mortgage of land can be discharged only by payment of the debt secured by it, or by a release. *Ellsworth v. Mitchell*, xxxi. 247. *Smith v. Stanley*, xxxvii. 11.

69. A renewal of the note, secured by such mortgage, is not such a payment as will discharge the mortgage, unless so intended by the parties. *Ellsworth v. Mitchell*, xxxi. 247.

70. Where the mortgagee takes, for the amount due upon the mortgage, the note of the assignee of the mortgager, including annual interest, and gives up to such assignee the notes of the mortgager, this, unexplained, is not to be considered as a mere renewal of the mortgager's notes, but as a substitute of a new security; and will discharge the mortgage. *Ellsworth v. Mitchell*, xxxi. 247.

71. When the purchaser of an equity of redeeming mortgaged land becomes also the assignee of the mortgage, there is not necessarily an extinguishment of either estate. *Simonton v. Gray*, xxxiv. 50.

72. If substantial justice may be promoted, the mortgage may be upheld by the assignee, according to his intention or his interest. *Simonton v. Gray*, xxxiv. 50. *Kinnear v. Lowell*, xxxiv. 299.

73. A mortgage is not discharged, under all circumstances, by a payment of the debt secured, if made by one not at the time owner of the equity, even if he were the mortgager. *Kennear v. Lowell*, xxxiv. 299.

74. Thus, such a payment coerced from the mortgager, who had previously conveyed the land by deed of warranty, subject to the mortgage, is not a discharge. *Kinnear v. Lowell*, xxxiv. 299.

75. And if, after such payment, the mortgager obtain an assignment of the mortgage, he may be considered the assignee of the mortgage and compel a re-payment from his grantee. *Kinnear v. Lowell*, xxxiv. 299.

76. If notes, secured by mortgage on land, are paid when or before they are due, by an absolute deed of the land mortgaged and other land, the title under the mortgage is extinguished. *Whitcomb v. Simpson*, xxxix. 21.

## V. REDEMPTION.

- (a) WHO MAY REDEEM, WHEN, FROM WHOM AND HOW.
- (b) ADJUSTMENT OF ACCOUNTS.
- (c) BILLS IN EQUITY TO REDEEM.

(a) *Who may redeem, when, from whom and how.*

77. A grantee of a part of mortgaged premises can redeem his interest, only by payment of the whole amount due on the mortgage. *Smith v. Kelley*, xxvii. 237.

78. Though a conveyance of land by A. be fraudulent and void as to creditors, and notes be taken therefor, secured by a mortgage of the same land,



the assignee of the mortgager is entitled to redeem as against any holder of the mortgage not claiming as a creditor of A., or standing in a relation which would entitle him to such an objection as a creditor might make. *Sprague v. Graham*, xxix. 160.

79. In such case, (except as to creditors or parties having the rights of creditors of A.,) the notes and mortgage are valid in the hands of an innocent indorsee and assignee, but are subject to equities if indorsed when over due. *Sprague v. Graham*, xxix. 160.

80. If the mortgager of land, or his assignee, convey the same by deed of warranty, he is no longer entitled to redeem against the mortgage. *Elder v. True*, xxxii. 104.

81. His grantee is under no obligation to redeem. *Elder v. True*, xxxii. 104.

82. A widow has the right to redeem real estate, mortgaged by her husband during coverture, although the rights of the mortgagee and also of the mortgager have both come by assignment to the defendant, and although, in the mortgage deed, she relinquished her right of dower. *Simonton v. Gray*, xxxiv. 50.

83. Several conveyances by a mortgager of distinct parts of the land give to each of the grantees, and persons claiming under them respectively, the right of redeeming; though not without paying the whole amount due on the mortgage. *Bailey v. Myrick*, xxxvi. 50.

84. The mortgager has three years from the time of the last publication in which to redeem his mortgage, when the foreclosure has been effected by publishing notice in a newspaper under the statute. *Holbrook v. Thomas*, xxxviii. 256.

85. If a mortgager suffer a sale of the mortgaged premises, in his presence, without making known his claim, but under a reasonable apprehension that there had been a foreclosure, and that his right of redemption had expired, he does not thereby lose his rights. *Dixfield v. Newton*, xli. 221.

86. Such a conveyance was made to a town by deed, and the notes secured by mortgage transferred, the mortgager being present and assenting, under a misunderstanding of his rights. The mortgager released certain claims he had against the town, and the town contracted to convey the premises to his son-in-law, on condition that he should support the mortgager and wife:—*Held*, that this arrangement did not change the position of parties in relation to the title to the land. *Dixfield v. Newton*, xli. 221.

87. After the notes and deed were delivered to the committee of the town, the notes were passed into the hands of the mortgager:—*Held*, that such delivery did not constitute a redemption of the mortgage, no value having been paid by him therefor. *Dixfield v. Newton*, xli. 221.

(b) *Adjustment of accounts.*

88. If an assignee purchase the mortgage by the payment of a sum less than the amount actually due, still the mortgager or his assignee will not be entitled to redeem without payment of the full amount. *Pease v. Benson*, xxviii. 336.

89. The net avails of timber, taken by a third person, from mortgaged land, must be appropriated toward the extinction of the mortgage, if such

taking was with the approbation of the mortgager and mortgagee, upon an understanding that such third person should thus appropriate it. *Howe v. Russell*, xxxvi. 115.

90. This rule is not affected by the existence of a prior outstanding mortgage, if the prior mortgagee do not claim the appropriation. *Howe v. Russell*, xxxvi. 115.

91. The holder of a personal claim, with a mortgage of land as collateral, may recover the balance due on the debt, after foreclosure, by a suit at law. And, by permitting the foreclosure, the mortgager waives all claim to be allowed in such suit for the net income which accrued to the mortgagee from the land during the three years of foreclosure. *Porter v. Pillsbury*, xxxvi. 278.

92. In redeeming land, of which the mortgagee had taken possession for a foreclosure, if he account for the net incomes actually received, the burden is upon the mortgager to show a want of ordinary care in its management. *Porter v. Pillsbury*, xxxvi. 278.

(c) *Bills in equity to redeem.*

93. If a mortgager, or his assignee, would enable himself to maintain a bill in equity to redeem the premises from the mortgage by means of a tender of the amount due, he must make the tender to the mortgagee or person claiming under him, and not to an assignee of the contract secured by the mortgage. *Smith v. Kelley*, xxvii. 237.

94. It was the design of R. S. of 1841, c. 125, § 16, to enable the mortgager, in certain cases, to maintain a bill in equity to redeem a mortgage, without the performance, or tender of performance, of the condition; but not to authorize him to recover costs, unless prevented from doing it by some act of the mortgagee or his assignee. *Pease v. Benson*, xxviii. 336. *Bourne v. Littlefield*, xxix. 302. *Sprague v. Graham*, xxxviii. 328.

95. The mere denial of the right of the mortgager to redeem will not prevent his tendering performance, and, of itself, will not authorize the awarding of costs to the complainant. *Pease v. Benson*, xxviii. 336.

96. And any failure to afford information of the exact amount claimed to be due upon the mortgage, to the party seeking to redeem, and within a reasonable time after request, is an unreasonable neglect and refusal under the statute. *Pease v. Benson*, xxviii. 336.

97. A party who comes into a court of equity to redeem a mortgage, although entitled to redeem, must pay cost to a defendant who is not in fault. *Bourne v. Littlefield*, xxix. 302.

98. A bill in equity to redeem cannot be maintained, when the mortgagee is not in possession, and when the condition of the mortgage has been fulfilled. *Chadbourne v. Rackliff*, xxx. 354.

99. A bill for redemption may be maintained without a previous payment or tender, if the mortgagee, or person claiming under him, shall have neglected on request to render, before the commencement of the suit, a true account of the sum due and secured by the mortgage. *Roby v. Skinner*, xxxiv. 270.

100. After such request, the mortgagee is to be the moving party, not only in making up the account, but also in rendering it to the mortgager; for which a reasonable time is allowed. *Roby v. Skinner*, xxxiv. 270.

101. Though the mortgager, in demanding the account, may have prescribed

a time unreasonably short, in which it should be rendered, that will not excuse a neglect to do it in a reasonable time. *Roby v. Skinner*, xxxiv. 270. *Farwell v. Sturdivant*, xxxvii. 308.

102. Where a mortgager had made several conveyances of distinct parts of the mortgaged land, in a bill in equity to redeem, by one of such grantees, or any person claiming under him, it is requisite that all other persons holding under any of such conveyances should be made parties to the bill. *Bailey v. Myrick*, xxxvi. 50.

103. If the answer of the mortgagee shows information to have been received by him from the mortgager, that the right of redemption has been assigned to a third person, such third person must be made a party. *Bailey v. Myrick*, xxxvi. 50.

104. In a bill to redeem, by the assignee of the mortgager, the latter need not be made a party, if he have transferred all his interest in the subject matter. *Bailey v. Myrick*, xxxvi. 50.

105. A master in chancery, commissioned to ascertain the amount due upon an outstanding mortgage, has no jurisdiction to adjudicate upon the titles to the estate mortgaged. *Howe v. Russell*, xxxvi. 115.

106. A court of equity, having jurisdiction of a suit for the redemption of mortgaged land, upon payment of the mortgage debt, may require, in such suit, that any over payment, made to the mortgagee upon such debt, shall be refunded, without resort to an action at law. *Farwell v. Sturdivant*, xxxvii. 308.

107. A written notice upon a mortgagee, for an exhibit of the amount due, is not necessarily to be delivered by the mortgager personally; but a service of it by an officer is sufficient. *Farwell v. Sturdivant*, xxxvii. 308.

108. A mortgagee in possession for foreclosure, who neglects to render an account of rents and profits on lawful demand, and claims a greater sum than is due upon the mortgage, is liable for costs in the suit to redeem. *Sprague v. Graham*, xxxviii. 328.

109. A failure to pay the debt secured by a mortgage, at the time it is due, will interpose no obstruction, in a suit in equity, to a redemption by the mortgager, although a provision is incorporated into the mortgage that the mortgagee shall hold the land free from the right of redemption, if the debt is not paid at maturity. *Baxter v. Child*, xxxix. 110.

110. It is not for the Court, in a suit in equity, brought to redeem mortgaged premises, to ascertain the amount due, upon the payment of which the plaintiff is entitled to a conveyance; that is for the master. *Jewett v. Guild*, xlii. 246.

## VI. FORECLOSURE.

111. Under the statute of 1821, c. 39, the foreclosure of a mortgage cannot be made "by written consent of the mortgager," without an actual entry by the mortgagee, or person claiming under him, for condition broken. *Pease v. Benson*, xxviii. 336. *Storer v. Little*, xli. 69.

112. It cannot be caused by the written admission of parties, in a manner not authorized by the statute. *Pease v. Benson*, xxviii. 336.

113. Under the Act of 1839, c. 372, a written surrender of possession of mortgaged land, by the mortgager to the mortgagee, for the purpose of fore-

closure, is ineffectual unless recorded within thirty days from its date. *Southard v. Wilson*, xxix. 56.

114. Under statute of 1821, c. 39, § 1, when the mortgager has conveyed the right of redemption, the consent to an entry for foreclosure must be obtained from the party "claiming under him." *Chase v. Gates*, xxxiii. 363.

115. If one, to whom such right of redemption has been transferred, shall convey the same, taking back a mortgage, the entry to foreclose the first mortgage must be by consent of the same mortgagee. *Chase v. Gates*, xxxiii. 363.

116. Possession of land for twenty years, by a mortgagee, without any payment of principal or interest by the mortgager, or any dealings between him and the mortgagee in relation to the land, is presumptive evidence of a foreclosure. *Blethen v. Dwinall*, xxxv. 556.

117. The intention of the mortgagee, however clearly expressed, without showing he has performed the acts necessary to that purpose, will be ineffectual to establish a foreclosure. *Morris v. Day*, xxxvii. 386.

118. To effect a foreclosure by "taking peaceable and open possession in presence of two witnesses," &c., the certificate by them signed and recorded must contain all the facts essential to that purpose. *Morris v. Day*, xxxvii. 386.

119. Hence, the certificate must state that an entry was made for breach of the condition of the mortgage, and the time when it was made. *Morris v. Day*, xxxvii. 386.

120. And such witnesses cannot testify to any facts not contained in their certificate. *Morris v. Day*, xxxvii. 386.

121. To render a foreclosure under the second mode provided in R. S. of 1841, c. 125, effectual, an entry must be proved. A written consent to enter is not evidence of an entry. *Chamberlain v. Gardiner*, xxxviii. 548. *Storer v. Little*, xli. 69.

122. The possession required to be held by the mortgagee is equivalent to an actual possession. *Chamberlain v. Gardiner*, xxxviii. 548.

123. Such possession is not provable from the consent in writing by the mortgager, that he may enter, and that possession is thereby given. *Chamberlain v. Gardiner*, xxxviii. 548.

124. Neither will an admission by the mortgager that the "foreclosure was out," have any effect, the legal steps to effect a foreclosure not having been taken. *Chamberlain v. Gardiner*, xxxviii. 548.

125. Under a mortgage of real estate to secure a bond with certain conditions, in which was also this stipulation:—"that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to" certain persons named, "and their decision to be final," the mortgagee may enter for breach of condition, without resorting to the opinions of the arbitrators named in the bond. *Hill v. More*, xl. 515.

126. And, in an action involving the legality of the foreclosure, other evidence of the breach of the bond is admissible. *Hill v. More*, xl. 515.

127. Act of 1839, c. 372, additional, makes provision only as to the manner of authenticating notice of such entry and its registry. *Storer v. Little*, xli. 69.

128. A mortgage can be kept open by the express agreement of the parties,

or by facts from which an agreement may be satisfactorily inferred; but, in order to be effectual, it must be made by the mortgagee, or some one having an interest under him at the time. *Fisher v. Shaw*, XLII. 32.

129. The assignment of a mortgage, after an entry for a foreclosure, will not of itself stay the foreclosure. *Hill v. More*, XL. 515. *Hurd v. Coleman*, XLII. 182.

130. The assignee of a mortgage, after having recovered judgment in the name of the assignor, but for his own benefit, and before the writ of possession issued, entered into the premises, openly, peaceably, and with the assent of the mortgager, and continued in possession after the writ issued:—*Held*, that, from the time the writ of possession issued, the assignee could protect and justify his possession, under the statute of 1821, by “process of law,” and that the foreclosure commenced at the date of such writ, and it was completed in three years thereafter. *Hurd v. Coleman*, XLII. 182.

131. An entry by the mortgagee, without force, after the writ of possession had issued, or after the time within which by law it should have issued, would be an entry “by process of law,” and would as effectually foreclose the mortgage as if he had been put in possession by an officer having the writ. *Hurd v. Coleman*, XLII. 182.

132. A. conveyed to B. certain real estate, subject to a mortgage given by himself to a third person, and took back a bond conditioned to re-convey by quitclaim deed a certain portion of the premises, whenever A. should clear the remainder from incumbrance. C. agreed verbally with A., to take up this mortgage and assign it to the latter, on payment of the amount by him within a specified time. C. obtained an assignment of the mortgage to himself, and before the expiration of the time agreed upon with A., assigned it to B.:—*Held*,—

1st. That the contract was for the sale of an interest in lands, and, not being in writing, no action could be maintained thereon:—

2d. That being without consideration, it was not a waiver of the right to a re-payment of the mortgage within the time required by law to prevent a foreclosure:—

3d. That as A. did not furnish the consideration paid for the assignment, there was no foundation for a trust in C. by implication:—and,—

4th. That the non-fulfillment by C., or his assigns, furnished no basis for a suit under the head of fraud. *Fisher v. Shaw*, XLII. 32.

See PAYMENT, 6.

## VII. ACTIONS AT LAW, AND JUDGMENTS THEREON.

133. The commencement and prosecution of an action upon a mortgage, amounts to a waiver of any prior entry to foreclose the same. *Smith v. Kelley*, XXVII. 237.

134. The mortgagee may maintain an action to recover the possession, without proof that the condition has been broken, unless there is a stipulation in the mortgage to the contrary. *Allen v. Parker*, XXVII. 531. *Clay v. Wren*, XXXIV. 187. *Brown v. Leach*, XXXV. 39. *Norton v. Webb*, XXXV. 218.

135. If the mortgage debt has been paid, no action can be maintained upon the mortgage, though it has not been formally discharged. *Ellsworth v. Mitchell*, XXXI. 247. *Williams v. Thurlow*, XXXI. 392.

136. One who holds a mortgage of land made to a third person, together with the notes secured by it, can maintain no action upon the mortgage, unless the same had been assigned in writing. *Lyford v. Ross*, xxxiii. 197.

137. An agreement, forbidding a mortgagee from maintaining an action upon the mortgage before condition broken, may arise by implication from the mortgage and the written instruments executed with it, and intended to carry into effect the purposes of the parties. *Clay v. Wren*, xxxiv. 187.

138. Thus, where a mortgage, given to secure the price of a farm, was conditioned for the delivery, at the mortgager's barn, of a specified quantity of hay, for ten successive years, of an average quality with that cut by the mortgager upon the farm, the Court will infer that the hay was to be cut by the mortgager on the farm, and that in order to do so, he was to retain possession, until a breach of the condition. *Clay v. Wren*, xxxiv. 187.

139. Where the condition of the mortgage was merely for the delivery of the hay, but a note was given by the mortgager to the mortgagee at the same time for the same quantity of hay, deliverable at times and places specified in the mortgage, and also stating the quality and value of the hay, the Court will consider that the mortgage was intended to secure the note, although no note be referred to in the mortgage. *Clay v. Wren*, xxxiv. 187.

140. Such an agreement is also contained in the mortgage, "that the mortgager should fulfill a bond which he had given to maintain the mortgagee upon the farm, and to keep the farm in good order." *Brown v. Leach*, xxxv. 39. *Norton v. Webb*, xxxv. 218.

141. An agreement, forbidding the mortgagee to obtain possession before breach of the condition, must be in writing. *Norton v. Webb*, xxxv. 218.

142. An action upon a mortgage, to obtain a foreclosure, may be brought and maintained by the surviving mortgagee. *Williams v. Hilton*, xxxv. 547.

143. In the conditional judgment in favor of a mortgagee, there may be included sums paid by him for taxes, though assessed while out of his possession. *Williams v. Hilton*, xxxv. 547.

144. If, in addition to the mortgaged land, the mortgager be also in possession of adjoining land, it is his duty to cause the tax upon the mortgaged part to be separately assessed. And, if he omit that duty, and the tax be assessed on both lots collectively, without showing how much of it was upon the mortgaged part, the mortgagee, in order to prevent a forfeiture, may pay the whole tax, and include its amount in his conditional judgment upon the mortgage. *Williams v. Hilton*, xxxv. 547.

145. No conditional judgment can be rendered in behalf of a mortgagee or his assignee, unless he prove both an indebtedment and its amount. *Blethen v. Dwinah*, xxxv. 556.

146. An obligation under seal, given by the grantee at the time of his deed, to re-convey on the payment of a certain sum of money, operates as a deed of defeasance between the parties, though unrecorded. And, in an action by such grantee to recover the premises after forfeiture of the obligation, he will be entitled to a conditional judgment only, but for no rents. *Jackson v. Ford*, xl. 381.

## VIII. MORTGAGE OF CHATTELS.

147. A mortgage of personal property passes no title until delivery of the mortgage; a delivery of the property therein described not being sufficient proof of the delivery of the mortgage. *Jewett v. Preston*, xxvii. 400. *Foster v. Perkins*, xlii. 168.

148. If a mortgage of personal property stipulate that it shall become void upon the payment of two notes, particularly described by their amounts and dates, and the mortgagee never had any notes of such description, the mortgagee acquires nothing by his mortgage, although, at the time, he held three other notes against the mortgager for different sums, and with different dates. *Jewett v. Preston*, xxvii. 400.

149. The mortgagee of personal property, even after he has taken possession, but before foreclosure, may waive his lien under his mortgage and attach the same upon the debt secured by it. *Libby v. Cushman*, xxix. 429.

150. A mortgagee, who thus waives his mortgage lien, has no longer a title to the property as owner, and consequently is not obliged to account for its value. *Libby v. Cushman*, xxix. 429.

151. The right of possession in such mortgage is in the mortgagee, before as well as after a breach of condition, unless controlled by some agreement between the parties. *Libby v. Cushman*, xxix. 429. *Pierce v. Stevens*, xxx. 184. *Stewart v. Hanson*, xxxv. 506. *Foster v. Perkins*, xlii. 168.

152. A mortgage of personal property, given to sureties to protect them against their suretyship, is not in force after the creditor has discharged the sureties. *Sumner v. Bachelder*, xxx. 35.

153. Thus, where a debtor gave to his sureties such a mortgage to secure them against their suretyship upon a note, and they assigned the mortgage to the creditor for his security, taking from him a discharge, under seal, of their liability on the note, the mortgage is thereby discharged. *Sumner v. Bachelder*, xxx. 35.

154. Parol evidence is admissible to prove, that, at the time of making a mortgage of personal property, the parties agreed that the possession should remain with the mortgager. *Pierce v. Stevens*, xxx. 184.

155. If a town clerk omit to note the time when he received a mortgage of personal property to be registered, the mortgage will take effect from the time when it was actually recorded. *Holmes v. Sprowl*, xxxi. 73. *Head v. Goodwin*, xxxvii. 181.

156. The right of possession of personal property mortgaged, is presumed to be in the mortgagee, unless it appear that the mortgager retained the right. *Holmes v. Sprowl*, xxxi. 73.

157. Although the mortgagee of personal property may have taken possession for condition broken, the law does not appropriate the property to the payment of the debt, until the expiration of the sixty days foreclosure. *Covell v. Dolloff*, xxxi. 104.

158. And, while thus in possession, he is bound only to ordinary diligence for the preservation, while the right of redemption exists. *Covell v. Dolloff*, xxxi. 104.

159. If the property be destroyed, without his fault, while thus holding it for security of his debt, he is not bound to account for its value. *Covell v. Dolloff*, xxxi. 104.

160. A mortgage of personal property, given to secure the mortgagee from

a contingent liability as an indorser, or surety, upon negotiable paper, is discharged by a payment of such paper. *Franklin Bank v. Pratt*, xxxi. 501.

161. Where a mortgager of personal property, (made to the defendant to secure him as indorser of a note and acceptor of a draft,) was released by the defendant for the purpose of using him as a witness, in an action against such indorser and acceptor, such release is a discharge of the mortgage. *Franklin Bank v. Pratt*, xxxi. 501.

162. Personal property, under mortgage, and remaining by its terms in possession of the mortgager, is not attachable as the property of the mortgagee. *Morton v. Hodgdon*, xxxii. 127.

163. If mortgagees of personal property, when summoned as trustees of the mortgager, would rely upon the foreclosure, they must state the conditions of the mortgage, and that a foreclosure had occurred. *Dexter v. Field*, xxxii. 174.

164. A mortgage of personal property, made to a number of persons to secure them against their liabilities, as indorsers for the mortgager, is not invalidated by the fact that no two of the mortgagees were liable upon any one paper. *Wheeler v. Nichols*, xxxii. 233.

165. Should any trespass be committed upon the rights derived under the mortgage, the action for redress may be brought jointly by all the mortgagees. *Wheeler v. Nichols*, xxxii. 233.

166. The owner of personal property, attached and retained by the officer or his bailee, may transfer his interest therein either absolutely or in mortgage, subject to the attachment lien. *Wheeler v. Nichols*, xxxii. 233.

167. When such a mortgage has been made, and the bailee of the attaching officer consents to hold the goods as servant of the mortgagee, and actually holds for him, there is such a taking of delivery and retaining possession by the mortgagee as to render the record of the mortgage unnecessary, although the debt secured thereby exceeds thirty dollars. *Wheeler v. Nichols*, xxxii. 233.

168. In trover for an article mortgaged to the plaintiff, the mortgage alone is *prima facie* evidence of property in him, as against a subsequent vendee of the mortgager. *Brooks v. Briggs*, xxxii. 447.

169. And if the defence be set up that the mortgage debt has been paid, the *onus* is on the defendant. *Brooks v. Briggs*, xxxii. 447.

170. Though a mortgager of a chattel, by the terms of the mortgage, should be entitled to possession of the property mortgaged, till the pay-day of the debt, yet an unconditional sale of it by the mortgager will authorize the mortgagee to take immediate possession. *Whitney v. Lowell*, xxxiii. 318.

171. A conveyance of chattels, unconditional in its form, need not be recorded, although intended merely for security, and although the chattels are permitted to remain in possession of the vendor, and the debt thereby secured is more than thirty dollars. *Knight v. Nichols*, xxxiv. 208.

172. Whether the adoption of that form would be indicative of a fraudulent intent, as against creditors, would be for the jury. *Knight v. Nichols*, xxxiv. 208.

173. A mortgage of chattels transfers to the mortgagee the legal title, subject to be defeated upon a redemption within the stipulated time. *Stewart v. Hanson*, xxxv. 506.

174. If mortgaged personal property is not redeemed within sixty days



after breach of the condition, the title of the mortgagee becomes absolute by operation of law. *Thompson v. Moore*, xxxvi. 47. *Clapp v. Glidden*, xxxix. 448.

175. But he may extend the time of performance and waive the forfeiture. *Thompson v. Moore*, xxxvi. 47.

176. And a sale by the mortgagee of a part of the goods, before the time of foreclosure had expired, implied an understanding that a disposition should be made of the property different from that prescribed by law. *Thompson v. Moore*, xxxvi. 47.

177. In such case, the mortgager may recover the surplus avails over the amount due upon the mortgage. *Thompson v. Moore*, xxxvi. 47.

178. The validity of a mortgage of chattels is not impaired, from the fact that it is recorded upon a book of town records. *Head v. Goodwin*, xxxvii. 181.

179. A certificate of the town clerk on the back of such mortgage, as to when it was received, is legal evidence of the fact so certified. *Head v. Goodwin*, xxxvii. 181. *Stevens v. Whittier*, xliii. 376.

180. And when he further certifies that he has recorded it, without other date than that of its reception, that is to be taken as the time it was recorded. *Head v. Goodwin*, xxxvii. 181. *Stevens v. Whittier*, xliii. 376.

181. The recording of such a mortgage supersedes the necessity of noting, in the book of records, the time when it was received. *Head v. Goodwin*, xxxvii. 181. *McLarren v. Thompson*, xl. 284.

182. A mortgage of personal property, to be valid against others than the parties to it, must be recorded, or the possession of the property taken and retained by the mortgagee. *Beeman v. Lawton*, xxxvii. 543.

183. A delivery of personal property for security is not a transfer on condition, and does not constitute a mortgage thereof, but a pledge merely. *Beeman v. Lawton*, xxxvii. 543.

184. A promissory note, given for a specific sum for a cow, in which it is stipulated that the cow shall remain the property of the promisee until the note is fully paid, is in the nature of a mortgage, and the promisee, where there is no stipulation to the contrary, is entitled to the possession of the property until the note is paid. *Woodman v. Chesley*, xxxix. 45.

185. And where such a note and contract were made for security only of the payment of another note by the same maker, for a yoke of oxen, containing a similar provision as to the oxen, the taking possession of the oxen by the promisee, before their maturity, although they were of the full value of the note, will not impair his right to the cow, before their maturity. *Woodman v. Chesley*, xxxix. 45.

186. Such contracts are valid both before and after assignment. *Woodman v. Chesley*, xxxix. 45.

187. To avoid a mortgage as fraudulent as against creditors the mortgagee must be connusant of, and participant in, the fraudulent design. *McLarren v. Thompson*, xl. 284.

188. A note, given by two persons as part payment for a mare, containing these words:—"said mare to be holden to J. S. G., (one of the signers,) for the amount he may pay for the same," is not a mortgage, and need not be recorded. *Gushee v. Robinson*, xl. 412.

189. It is not essential, to the validity of a mortgage of personal property,

that a schedule of the goods therein referred to, but not made a part of it, should be recorded. *Chapin v. Cram*, XL. 561.

190. A mortgage of a stock of goods, containing a clause that goods which might thereafter be purchased by the mortgager, to replace those enumerated, as also all additions to the stock, should be held for the payment of the notes recited, will not transfer to the mortgagee goods afterwards purchased and put in with the stock by the mortgager. *Chapin v. Cram*, XL. 561.

191. A mortgage of chattels dated Nov. 9, 1854, but recorded as dated March 29, 1854, is not valid as against attaching creditors. *Stedman v. Perkins*, XLII. 130.

192. The delivery of a mortgage to the register, and its subsequent possession by the mortgagee, in the absence of other proof, are sufficient evidence of its delivery. The date of a mortgage is *prima facie* evidence that it was then delivered. *Foster v. Perkins*, XLII. 168.

193. The statute makes no distinction between resident and non-resident mortgagees. *Foster v. Perkins*, XLII. 168.

194. The Act of United States of July 29, 1850, relating to the record of mortgages, &c., of vessels, applies only to vessels which have been registered or enrolled at the time the mortgage is made. Before such registry or enrollment, mortgages upon vessels are governed by the statutes of the State, relating to mortgages of personal property. *Foster v. Perkins*, XLII. 168.

195. A mortgaged a vessel to B., conditioned that A. should retain possession of, and keep the vessel in N. Y., for a certain period for the purpose of selling her to liquidate the mortgage debt: — *Held*, that the right of possession by the mortgager was not such as to deprive the mortgagee of the right to take actual possession as against a tort feazor; and that the mortgager was the agent of the mortgagee, and that he had a qualified possession for the mortgagee's benefit. *Foster v. Perkins*, XLII. 168.

See ATTACHMENT, 3, 14.

## MUNICIPAL COURT.

1. The Act incorporating the city of Augusta provided for the establishment of a Municipal Court, consisting of one Judge who should have "concurrent jurisdiction with justices of the peace in all matters, civil and criminal, within the county of Kennebec. *Hersom, pet'r*, XXXIX. 476.

2. A conviction, under the Act of 1855, c. 166, § 2, of a violation of its provisions, before such Judge, and sentence thereon, are illegal and void. *Hersom, pet'r*, XXXIX. 476.

## MURDER.

1. The rule of common law is in force in this State, that, when the death of a human being occurs by the act of one, who is in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter,

according as the *intended* offence is a felony or misdemeanor. *State v. Smith*, xxxii. 369. *Smith v. State*, xxxiii. 48.

2. Whether such intended offence be a felony or misdemeanor is to be ascertained by our statute classification. *State v. Smith*, xxxii. 369.

3. Any crime *liable* to be punished by imprisonment in the State prison is a felony; although, by statute, made punishable in the alternative, *either* in the State prison, or the county jail, or by a fine. *State v. Smith*, xxxii. 369. *Smith v. State*, xxxiii. 48.

4. In an indictment for murder, alleging the act to have been done with a specified instrument, it is not necessary to be proved that the act was done with that particular instrument, if the *nature* of the violence and the kind of death occasioned by the means proved, be the same. *State v. Smith*, xxxii. 369.

5. The using of any means, with intent to "destroy" the child of which a female is pregnant, and the *destroying* of the child thereby before its birth, unless done to preserve the life of the mother, constitute a felony. And if, by the use of such means and with such intent, the death of the mother be occasioned, it is murder. *Smith v. State*, xxxiii. 48.

6. The using of means, with intent to procure the *miscarriage* of a pregnant female, and the procuring the miscarriage thereby, unless done to preserve the life of the mother, is a *misdemeanor*. And if, by the use of such means and with such intent, the death of the mother be occasioned, it is manslaughter. *Smith v. State*, xxxiii. 48.

7. If, upon such a charge in an indictment, a verdict of murder be rendered, it will be reversed for error. *Smith v. State*, xxxiii. 48.

8. To convict one of a felonious assault, with intent of his malice aforethought to kill and murder, the evidence must be such that if death had ensued he would have been guilty of murder. *State v. Neal*, xxxvii. 468.

9. At common law, *express* malice is where one, with a sedate and liberal mind, and formed design, does kill another, which formed design is evidenced by external circumstances, discovering the inward intention. *State v. Neal*, xxxvii. 468.

10. Malice is *implied* by law from any deliberate, cruel act, committed by one person against another, suddenly, without any or without considerable provocation. *State v. Neal*, xxxvii. 468.

11. Chapter 154, § 29 of R. S. of 1841, recognizes, as distinct offences, an assault with intent to murder, and an assault with intent to kill, unknown to the common law. *State v. Waters*, xxxix. 54.

12. An assault, with intent to murder, necessarily involves an assault with intent to kill; and where a party is accused of the greater, the jury are authorized to find him guilty of the lesser offence. *State v. Waters*, xxxix. 54.

13. Murder is the unlawful killing of a human being with malice aforethought, either expressed or implied. *State v. Conley*, xxxix. 78.

14. Murder of the first degree is the unlawful killing of a human being, with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the State prison for life, or for an unlimited term of years. *State v. Conley*, xxxix. 78.

15. Murder of the second degree is any murder, committed otherwise than set forth in the preceding paragraph. *State v. Conley*, xxxix. 78.

See PRESUMPTION, 10.

## NEW TRIAL.

- I. GENERALLY.
  - II. NEWLY DISCOVERED EVIDENCE.
  - III. MISTAKE OR FAULT OF JURORS.
  - IV. ERRORS OF THE COURT.
- 

## I. GENERALLY.

1. The fact that the assured, in his affidavit, estimated the value of the goods consumed at \$2800, and the jury returned a verdict for \$1853 only, is not such evidence of fraud and false swearing as will justify the Court in granting a new trial. *Moore v. Protection Ins. Co.*, xxix. 97.

2. Where, upon a writ of error, it does not appear but that the original action might have been maintained, though there is error in the proceedings, the judgment must be reversed and a new trial be granted. *Crawford v. Howard*, xxx. 422.

3. A motion to set aside a verdict, on proof that a juror was related to one of the parties, cannot prevail, if, at the opening of the case to the jury, the party making the motion was present and knew of the disqualification, and did not object. *Dolloff v. Stimpson*, xxxiii. 546. *Goodwin v. Cloudman*, xliii. 577.

4. The motion will not be aided by proof, that the party making it was, at the time of the trial, ignorant of the law creating the disqualification. *Dolloff v. Stimpson*, xxxiii. 546.

5. A verdict will not be set aside, upon proof of the existence of evidence which was previously known to the party making the motion. *Ham v. Ham*, xxxix. 263.

6. Where a conviction was obtained of being a common seller, under Act of 1851, c. 211, more than two years after the acts complained of, the respondent is entitled to a new trial. *State v. Gray*, xxxix. 353.

7. After verdict against the respondent in a bastardy process, a new trial will not be granted because the jury found that the child was begotten at a later time than that charged in the complaint and declaration. *Beals v. Furbish*, xxxix. 469.

8. Where the jury adopted the true measure of damages, when they should have been assessed by the Court, the verdict will not be set aside on that account. *Newton v. Newbegin*, xliii. 293.

9. In order to set aside a verdict because a juror was related to the prevailing party, the proof should exclude the reasonable possibility of knowledge of this fact on the part of the party making the motion, and of his counsel. *Goodwin v. Cloudman*, xliii. 577.

## II. NEWLY DISCOVERED EVIDENCE.

10. A new trial will not be granted, merely because the party has newly discovered evidence to prove a certain fact, unknown to him at the trial, if, by the use of ordinary diligence, he could have ascertained the fact before trial. *Howard v. Grover*, xxviii. 97.

11. On the ground of newly discovered evidence, a new trial should only be granted, where such testimony is not cumulative, and where there is reason to believe that it would change the verdict. *Handly v. Call*, xxx. 9. *Snowman v. Wardwell*, xxxii. 275. *Ham v. Ham*, xxxix. 263.

12. A new trial will not be granted upon that ground, if, at the trial, the proposed witness was precluded on account of interest in behalf of the party moving for the new trial, although that interest has since been removed. *Franklin Bank v. Pratt*, xxxi. 501.

### III. MISTAKE OR FAULT OF JURORS.

- (a) MISBEHAVIOR OR MISTAKE OF JURORS.
- (b) VERDICT AGAINST LAW OR EVIDENCE.
- (c) EXCESSIVE OR INADEQUATE DAMAGES.

#### (a) *Misbehavior or mistake of jurors.*

13. A person, drawn as juror, and also summoned as witness for the prevailing party, cannot receive fees as a witness during the time he was sitting as a juror to try the cause. But, if neither the juror nor the party prevailing knew it to be incorrect, and if there be no evidence of corrupt intention, the verdict will not be set aside. *Handly v. Call*, xxx. 9.

14. It is misconduct for one or more jurors to leave their room without leave of the Court. But if it do not appear that some injury to either party could have resulted from it, it is not sufficient ground for a new trial. *Newell v. Ayer*, xxxii. 334. *Parsons v. Huff*, xxxviii. 137.

15. Where, from the evidence and verdict, it is plain that the jury have mistaken their duty, a new trial will be granted. *Eveleth v. Harmon*, xxxiii. 275.

16. Where conflicting testimony upon the question at issue is submitted to the jury, the Court have no authority to set aside the verdict, unless it manifestly was found from prejudice, bias or improper influence, or by a mistake of the law or facts of the case. *Gardiner v. Farmingdale*, xxxvi. 252.

17. If one of the jurors, without being in charge of an officer, be permitted by the Court, when not in session, to absent himself temporarily from the panel, before verdict was agreed upon, the verdict will not be set aside, unless some prejudice appears to have been suffered by the moving party. *Parsons v. Huff*, xxxviii. 137.

18. If such permission be objectionable, a party with knowledge of the proceeding, who waits for the verdict to be rendered before making his objections, will be considered to have waived them. *Parsons v. Huff*, xxxviii. 137.

#### (b) *Verdict against law or evidence.*

19. A motion for a new trial, because the verdict was against the evidence, is grantable in some measure at discretion. And where the Court is satisfied that injustice has not been done, a new trial should not be granted, ordinarily. *Handly v. Call*, xxvii. 35.

20. For this reason, it is sufficient to authorize the granting of a new trial,

if the Court are satisfied that the facts of the case were not fully understood. *Bangor v. Brunswick*, xxvii. 351. *Edwards v. Currier*, xliii. 474.

21. The District Court, after verdict and before judgment, on motion and without any additional evidence, may set aside the verdict in a bastardy process, because in its opinion it is against evidence, and grant a new trial. *Eaton v. Elliott*, xxviii. 436.

22. Where the declaration is on a special contract, the contract must be proved as set forth. And where the evidence, in reference to the contract and its breach, is altogether variant from the declaration, a verdict for the plaintiff, not warranted by the evidence, must be set aside. *Kidder v. Flagg*, xxviii. 477.

23. If, from the testimony presented, the Court does not find itself authorized to conclude that the jury acted under the influence of passion, bias or prejudice or mistake, it cannot set aside the verdict as against the weight of evidence. *Glidden v. Dunlap*, xxviii. 379. *Handly v. Call*, xxx. 9. *Franklin Bank v. Pratt*, xxxi. 501. *Gardiner v. Farmingdale*, xxxvi. 252. *Weld v. Chadbourne*, xxxvii. 221. *Coombs v. Topsham*, xxxviii. 204. *Bryant v. Glidden*, xxxix. 458. *Hunnewell v. Hobart*, xl. 28. *Sawyer v. Nichols*, xl. 212. *Milo v. Gardiner*, xli. 549. *Hill v. Nash*, xli. 585. *Beal v. Cunningham*, xlii. 362.

24. Where the only ground of recovery was, that he represented himself to one to be a partner with another, who bought merchandize of the plaintiffs; a verdict for the defendant will not be set aside when it did not appear, from the evidence at the trial, that such representation was communicated to the plaintiffs before the delivery of the goods. *Palmer v. Pinkham*, xxxvii. 252.

25. A motion to set aside a verdict, as against evidence, must be sustained with a report of the whole evidence submitted to the jury. *Rogers v. Ken. & Port. R. R. Co.* xxxviii. 227. *Nutt v. Merrill*, xl. 237. *Bradbury v. Saco W. P. Co.*, xli. 155. *Freeman v. Morey*, xli. 588. *Lakeman v. Pollard*, xliii. 463.

26. Where a disclaimer was incorporated into the general issue, and the demandant recovered the value of more land, without improvements, than he owned, a new trial could not avail the tenant, as the cause must be tried again upon the same pleadings. *Put. F. School v. Fisher*, xxxviii. 324.

27. Unless the jury are instructed to ascertain and determine the use or want of "ordinary care," under the condition of things at the time of the accident, as disclosed by the testimony, it is good cause for setting aside the verdict. *Garmon v. Bangor*, xxxviii. 443.

28. When jurors have had an opportunity to examine for themselves in regard to matters testified to by witnesses, their verdict will not be set aside on motion, because it differs from the testimony. *Brown v. Moran*, xlii. 44.

### (c) *Excessive or inadequate damages.*

29. Damages, awarded by a jury, may have been greater than the Court would have awarded upon the evidence. But Courts will not set aside verdicts on the ground that damages are either excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of law or fact. *Kimball v. Bath*, xxxviii. 219.

30. The jury having, by misapprehension, found a verdict for \$317,46,

when by the evidence the plaintiff was entitled to recover no more than \$150: *Held*, that a new trial must be granted, unless the excess and interest thereon from the date of the writ be remitted by the original plaintiff. *Jewell v. Gage*, XLII. 247.

#### IV. ERRORS OF THE COURT.

(a) MISSTATEMENT OF THE LAW.

(b) ADMISSION OF IMPROPER EVIDENCE.

##### (a) *Misstatement of the law.*

31. The Court may decline to set aside a verdict, when rightfully found, though under erroneous instructions, only when it can perceive that, under correct instructions, a different verdict could not have been rightfully found. *Noyes v. Shepherd*, XXX. 173.

32. If the instructions of the Judge are such as to withdraw a question from the jury which belonged exclusively to them to decide, still, if, in the opinion of the Court, there was no evidence from which the jury would have been authorized to decide the question in favor of the party complaining, such erroneous instruction will furnish no sufficient cause for granting a new trial. *Copeland v. Copeland*, XXVIII. 525.

33. Though the construction of a paper be erroneously submitted to the decision of the jury, yet, if their decision be correct, such submission is not sufficient ground for a new trial. *Milliken v. Tufts*, XXXI. 497.

34. Immaterial instructions furnish no ground for disturbing the verdict. *McCrillis v. Hawes*, XXXVIII. 566. *Hardy v. Colby*, XLII. 381.

##### (b) *Admission of improper testimony.*

35. If it be reasonable to believe that the jury could have been unduly influenced by improperly admitted testimony, or if it be doubtful whether they would otherwise have determined as they have done, a new trial should be granted. *Handly v. Call*, XXVII. 35.

36. Where the plaintiff was allowed to read to the jury an attested copy of a registered deed, "provided he should file an affidavit, in the course of the trial, of the loss of the original," and the case was submitted to the jury, without any objection that the condition had not been performed:—*Held*, that it may be considered as waived; and that, if that omission to file the affidavit did no injury to the defendant, the verdict would not be disturbed. *Handly v. Call*, XXX. 9.

37. Certain facts having been proved by the plaintiff, by competent evidence, a new trial will not be granted because the Court had improperly allowed a witness for the defence to testify to the same facts, at an earlier stage of the trial. *Fogg v. Babcock*, XLI. 347.

## NONSUIT.

1. After the nonsuit of an action, a second suit upon the cause may be stayed under R. S. of 1841, c. 115, § 89, until the defendant's costs in the former action be paid, notwithstanding the second suit is brought by an assignee, who, when purchasing the demand, had no knowledge that it had previously been put in suit. *Warren v. Homsted*, xxxii. 36.

2. The Judge may order a nonsuit, after the plaintiff's testimony shall have all been introduced, if he deem it incompetent to maintain the suit; but it is otherwise, after evidence has been introduced by both parties. *Lyon v. Sibley*, xxxii. 576. *Emerson v. Joy*, xxxiv. 347. *Bragdon v. Appleton Mut. Fire Ins. Co.*, xlii. 259. CUTTING, J., dissenting.

3. But where a plaintiff has examined one of his witnesses solely to prove the execution of papers used on the trial, an examination of him by the defendant on other and distinct matters, immaterial to the issue, will not take from the Judge the power to order a nonsuit. *Frye v. Gragg*, xxxv. 29.

4. In an action upon an order drawn upon a company and purporting to be accepted by the directors thereof, where its execution is denied, without proof of the handwriting of the acceptors, and that they were directors, a nonsuit may be properly ordered. *Small v. Sacramento N. & M. Co.*, xli. 274.

5. When a nonsuit has been ordered, because the declaration set forth no legal cause of action, the Court will not set it aside on the ground of convenience, it being clear that the plaintiff cannot sustain a judgment upon such defective declaration. *Smith v. Abbott*, xl. 442.

6. A nonsuit ought not to be ordered, though the presiding Judge may have drawn proper inferences from the testimony, and arrived at a correct result, if the facts were such as might justify a jury in coming to a different conclusion, without danger of their verdict being set aside, as against the weight of evidence. *Fickett v. Swift*, xli. 65.

## NOTICE AND NOTIFICATIONS.

1. When persons, appointed to decide upon the property rights of others, are required by law to give previous notice of the time or place of their proceeding, the giving of such notice is not an outside act, but is one embraced in the trust to them committed. *Clifton, pet'rs*, xxxiii. 369.

2. If the law require that such persons, before acting under their appointment, shall take an oath of faithfulness, they must take the oath before designating, by notification, the time and place of their proceeding. *Clifton, pet'rs*, xxxiii. 369.

3. Otherwise, their proceedings cannot be sustained. *Clifton, pet'rs*, xxxiii. 369.

4. Thus, commissioners appointed under R. S. of 1841, c. 122, to locate public lots, in lands granted by the State, must be sworn before giving to parties the notice to which they are entitled, or their doings, under their warrant, cannot be accepted. *Clifton, pet'rs*, xxxiii. 369.



5. In an action for damages from a defect in a highway, counsel for the defendants admitted "notice," but argued to the jury that he did not admit "reasonable notice:"—*Held*, that "notice" and "reasonable notice" mean the same thing, and is conclusive upon the party. *Larrabee v. Searsport*, XLII. 202.

6. Handbills and newspaper notices, signed by the defendant, and published by him just before the sale, and exhibited at the time, in which the terms of sale are fully stated, cannot be received as evidence in aid or explanation of an imperfect memorandum. *O'Donnel v. Leeman*, XLIII. 158.

See ATTACHMENT, 7.

BAILMENT, 2, 3.

BOND, 1.

DEED, 43.

EVIDENCE, 420.

OFFICER, 42.

PAUPER, 73, 81, 84.

PLEADING, 19, 20, 21.

TAX, 12.

## NUISANCE.

1. There is nothing which can be regarded as a nuisance, when considered by itself alone, and separate from its use. It is the improper use or employment of a thing which causes it to become a nuisance. *Preston v. Drew*, XXXIII. 558.

2. Although a public nuisance is to be prosecuted for by the public, yet if it have occasioned to an individual any special damage, not common to others, he may maintain a suit for the injury. *Cole v. Sprowl*, XXXV. 161.

3. All hindrances or obstructions to navigation, without direct authority from the Legislature, are public nuisances. *Knox v. Chaloner*, XLII. 150. *State v. Freeport*, XLIII. 198.

4. A dam or bridge erected over navigable waters, under authority from the Legislature, in such a manner as to impede navigation beyond what the Act authorizes, is *pro tanto* a nuisance; which principle is applicable to streams capable in their natural state of floating boats and logs. *Knox v. Chaloner*, XLII. 150. *State v. Freeport*, XLIII. 198.

5. A public nuisance can never be legitimated by the lapse of time; and the remedy against it by abatement is in all respects concurrent with that by indictment. *Knox v. Chaloner*, XLII. 150. *Brown v. Black*, XLIII. 443.

See EASEMENT, 7.

TOWNS, 22.

## OATH.

The words “duly sworn,” or “sworn according to law,” when applied to any officer who is required to take and subscribe the oath prescribed in the constitution, are to be construed to mean, that he has taken the oath as required; and when applied to any other person, that such person has taken oath faithfully and impartially to perform the duties assigned to him in the case specified. *Bennett v. Treat*, xli. 226.

See ASSESSORS, 2.

NOTICE, &c., 2, 4.

TOWN, 35.

## OFFER TO BE DEFAULTED.

1. An offer to be defaulted admits nothing except that the defendant is willing to pay the sum offered, and no more. *Avery v. Straw*, xxx. 458. *Boynton v. Frye*, xxxiii. 216.

2. Where, in assumpsit, an offer to be defaulted for a specified sum is made, and not accepted, and, on the trial, no larger sum is recovered by the plaintiff, costs are to be allowed to the defendant from the time the offer was filed and set off against the sum offered, and the judgment will be rendered for the balance in favor of the plaintiff, with his costs to the time when the offer was entered. *Stone v. Waitt*, xxxi. 409.

3. An offer to be defaulted for a specified amount authorizes the plaintiff to take judgment for that amount, although he may fail to establish any claim. *Boynton v. Frye*, xxxiii. 216.

4. By Act of 1847, an offer to be defaulted for a sum certain, unaccepted, is no admission of the cause of action or of any indebtedment of the defendant; nor shall such offer be used as evidence before the jury in the trial. *Wentworth v. Lord*, xxxix. 71. *Gowdy v. Farrow*, xxxix. 474.

5. If, when such offer has been made, the plaintiff proceeds to trial, the judgment in the case must depend on the verdict rendered. The offer will affect the costs only. SHEPLEY, C. J., dissenting. *Wentworth v. Lord*, xxxix. 71.

6. Thus, when, after such offer, the action proceeded to trial, and a verdict was rendered for defendant:—*Held*, that the plaintiff is not entitled to judgment for the offer. *Wentworth v. Lord*, xxxix. 71.

7. An offer in writing, made by the defendant's attorney in these words:—“and now on this third day of the term, the defendant, by his attorney, comes and offers to be defaulted for the sum of seventy dollars damages in said action,” is a compliance with R. S. of 1841, c. 115, § 22. *Gowdy v. Farrow*, xxxix. 474.

8. In order to give a defendant, who has filed his offer to be defaulted, a right to costs under the R. S. of 1841, c. 115, § 22, the plaintiff must,—

1st. “Proceed to actual trial:”—and—

2d. Fail to recover a “greater sum for his debt or damage” than that for which the defendant offered to be defaulted. Per TENNEY, C. J., and APPLE-

TON, CUTTING, DAVIS, and HATHAWAY, J. J., and MAY and GOODENOW, J. J., dissenting. *Pingree v. Snell*, XLII. 53. *Mercer v. Bingham*, XLII. 289.

9. If there has been no trial, the defendant is neither entitled to costs by reason of his offer, nor thereby relieved from the payment of costs to the plaintiff. *Pingree v. Snell*, XLII. 53. *Mercer v. Bingham*, XLII. 289.

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OFFICER.

- I. AUTHORITY AND DUTY.
- II. LIABILITIES.
- III. JUSTIFICATION.
- IV. INDEMNITY.

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I. AUTHORITY AND DUTY.

- (a) WHO MAY SERVE.
- (b) HOW IT MAY BE SERVED.
- (c) SPECIFIC INSTRUCTIONS.
- (d) RETURN.
- (e) IN OTHER RESPECTS.

(a) *Who may serve.*

1. By R. S. of 1841, c. 104, a constable is authorized to serve "writs and precepts," in personal actions wherein the sum demanded does not exceed one hundred dollars. *Morrell v. Cook*, XXXI. 120. *Morrell v. Cook*, XXXV. 207.

2. That authority includes the service of executions issued on judgments in such action. *Morrell v. Cook*, XXXI. 120.

3. In the service of such writ, he may attach, and in the service of the execution, he may levy real estate. *Morrell v. Cook*, XXXI. 120. *Morrell v. Cook*, XXXV. 207.

4. A justice's writ may be served by the constable of a town, upon any person within that town, though such person may be an inhabitant of another town. *Blanchard v. Day*, XXXI. 494.

5. For an act affecting another's rights, and done by a person under claim of authority as a public officer, the authority may be established by proof, that such person had acted as such public officer, on other occasions. *Hutchings v. Van Bokelen*, XXXIV. 126.

6. A warrant, which the statute authorizes "any sheriff, city marshal or deputy" to serve, may be executed by a deputy of the sheriff, as well as by a deputy of the marshal. *State v. McNally*, XXXIV. 210.

7. The service of a writ by a constable, though it had not been directed to him, is valid and effectual, unless objected to pending the suit. *Morrell v. Cook*, XXXV. 207.

See SHERIFF.

(b) *How it may be served.*

8. An officer may attach an indivisible article of property, though far beyond the value he was directed by his precept to attach. *Moulton v. Chadbourne*, xxxi. 152.

9. In serving a writ, which directs the officer to attach the property of the defendant, and to summon him, there should be a separate summons, even though no actual attachment be made. In such a case, the service ought not to be made by a copy or by reading the original. *Blanchard v. Day*, xxxi. 494.

10. If an officer, having a writ for service, offer the summons to the defendant, who refuses to receive it, he may rightfully return that he delivered the summons, or he may return the facts specially, and they will be held as delivery. *Fuller v. Kenney*, xxxii. 334.

11. No particular ceremony is required in seizing real estate on execution by an officer. He need not enter upon the land during any stage of the proceedings of a levy. *Fitch v. Tyler*, xxxiv. 463.

12. Though personal property be of such character, that it cannot be removed immediately, an attachment of it cannot be made by a mere indorsement upon the writ. But the officer must be present and take the articles into his possession. *Darling v. Dodge* xxxvi. 370.

13. An attachment of property and an arrest of the body are unauthorized by the same writ. *Trafton v. Gardiner*, xxxix. 501.

14. When a return of an attachment has been made upon the writ, the officer cannot justify a subsequent arrest of the defendant, by showing that he did not own the property attached, or that it was ineffectual. *Trafton v. Gardiner*, xxxix. 501.

See ATTACHMENT, 23.

(c) *Specific instructions.*

15. A request, by the debtor, that the officer will attach other property, instead of that which he has already attached, imposes no duty upon the officer. Neither does the offer of a third person to deposit money, for the officer's security, to induce him to discharge the property attached, impose any duty. *Moulton v. Chadbourne*, xxxi. 152.

16. It is the officer's duty to attach personal property instead of real, if so directed. *Moulton v. Chadbourne*, xxxi. 152.

17. The mere offer, by the debtor, to have an appraisal of attached property, without any further steps taken by him, imposes no duty upon the officer. *Moulton v. Chadbourne*, xxxi. 152.

18. An officer is not bound to attach the goods of a debtor, out of his possession, unless specially ordered. *Weld v. Chadbourne*, xxxvii. 221.

19. If a creditor specially directs an officer to attach specific property of his debtor, not in his possession, he is required to do so, although he held older precepts against the same debtor with general orders to attach all his property. *Weld v. Chadbourne*, xxxvii. 221.

20. Whether, after such property has been attached under special directions, the officer is not excused from attaching the same on the older writs in his hands, from well grounded suspicions and reasonable grounds to believe

that the title might be in controversy, is a question for the jury. *Weld v. Chadbourne*, xxxvii. 221.

(d) *Return.*

21. Courts will give effect to the returns made by officers, although informal, when the intention is sufficiently disclosed by the language used to be clearly discernible; but not otherwise. *Hathaway v. Larrabee*, xxvii. 449.

22. Thus, where an officer made a return on a writ as follows, against three defendants:—"Penobscot, December 28, 1836, at 11 o'clock, A. M., I have attached all the right, title and interest the defendant has, in and to any real estate in the county of Penobscot:"—*Held*, that the language was too vague and uncertain to create a lien by attachment on the estate of either one of those defendants. *Hathaway v. Larrabee*, xxvii. 449.

23. An officer cannot contradict, as a witness, his return that, upon a levy of land, he had delivered seizin to the judgment creditor. *Cowan v. Wheeler*, xxxi. 439.

24. An officer's return, "that he gave the defendant the summons for his appearance at court," is sufficient evidence that he delivered to the defendant a separate summons, in form by law prescribed. *Blanchard v. Day*, xxxi. 494.

25. The return of the officer, in a levy, that the appraisers were discreet and disinterested men, is conclusive of that fact. *Grover v. Howard*, xxxi. 546.

26. An officer's return, of the attachment of personal property, is conclusive that the property therein described has been attached. *Darling v. Dodge*, xxxvi. 370.

27. So the return of an officer, upon an execution, is sufficient evidence that he held the execution for the purpose of collecting it. *Came v. Brigham*, xxxix. 35.

28. The return of an officer, as to the time of serving the writ upon the trustee, cannot be contradicted by the disclosure of such trustee. *Bunker v. Gilmore*, xl. 88.

See EVIDENCE, 266—274.

EXECUTION, 62—82, 90.

(e) *In other respects.*

29. For the keeping of property attached by an officer, no person is bound to render his services without present pay. *Kendrick v. Smith*, xxxi. 162.

30. Property, which the officer had no right to attach, cannot be retained by him for the purpose of enforcing a reimbursement of money, which he may have paid to discharge a prior lien upon it. *Morton v. Hodgdon*, xxxii. 127.

31. It is not lawful for an officer, in the discharge of an official duty, to make gain out of property entrusted by the law to his custody for the benefit of others. *Gannett v. Cunningham*, xxxiv. 56.

32. Hence, where an officer had sold upon mesne process, under R. S. of 1841, c. 114, the goods attached thereon, and taken a note to himself therefor, approved by the attaching creditor, he has no right to retain, for his own use, the interest accruing upon such note. *Gannett v. Cunningham*, xxxiv. 56.

33. An officer's authority to receive the attorney's costs of a writ may be inferred from their previous course of conduct. *Lee v. Oppenheimer*, xxxiv. 181.

34. The force which an officer may apply, to enable him to serve a legal precept, must be no greater than is necessary for the accomplishment of that purpose. *Murdock v. Ripley*, xxxv. 472.

35. Whether the degree of force used was unnecessary is for the jury. *Murdock v. Ripley*, xxxv. 472.

36. His own judgment, though honestly formed, and though he had no purpose to transcend his authority, is not conclusive as to the degree of force necessary. *Murdock v. Ripley*, xxxv. 472.

37. By the common law, an officer has authority to make an arrest upon reasonable ground of suspicion, without a warrant; and, if his suspicion vanishes, he may discharge the person arrested without returning him before a magistrate. *Burke v. Bell*, xxxvi. 317.

38. A deputy sheriff, who attaches personal property on mesne process, is bound to keep it thirty days after judgment, and deliver it on demand to any officer having the execution, and authorized to receive it, notwithstanding he ceased to be a deputy before the judgment. *Smith v. Bodfish*, xxxix. 186.

39. An officer, when making an arrest, is bound, on demand, to make known his authority. *State v. Phinney*, xlii. 384.

40. But his omission to do so only deprives him of the protection which the law would otherwise throw around him in the rightful discharge of his official duty. *State v. Phinney*, xlii. 384.

41. If a person, having been arrested, escapes, without questioning the authority of the officer, he is not, to the same extent, entitled to demand his authority upon a re-arrest as he was before. *State v. Phinney*, xlii. 384.

42. A deputy sheriff, assuming to act under R. S. of 1841, seized, as a whole, the property of a Railroad Corporation which extended into an adjoining county, in which he was not commissioned to act. After notice of sale had been given, and within ten days of the legal expiration of it, the Act of January 28, 1852, was passed, authorizing officers to seize and sell, as a whole, property so situated, without changing the requirement in regard to notice:—*Held*, that the notice of sale, having been given under a statute which did not authorize the seizure, was no notice, and the sale was void; and also, that a notice, under the Act of 1852, must be given thirty days previous to sale, and also, that the Act of 1852 does not dispense with any proceedings previously necessary to make a valid sale. *Benson v. Smith*, xlii. 414.

## II. LIABILITIES.

- (a) OF SHERIFFS, FOR ACTS OF THEIR DEPUTIES.
- (b) To CREDITORS.
- (c) To DEBTORS.
- (d) To OTHERS.
- (e) LIABILITY OF DEPUTIES.

(a) *Of sheriffs, for acts of their deputies.*

43. A contract between a deputy sheriff and a third person, for the keep-

ing of property attached, is a personal one; and the sheriff is not liable upon it. *Kendrick v. Smith*, xxxi. 162.

44. Though the service of such keeper was taxed by the deputy in the writ, and included in the judgment, and though the execution had been collected by the sheriff, the keeper can maintain therefor no action against the sheriff, after the latter has paid the taxed costs to the attorney upon his claim of lien for fees and disbursements. *Kendrick v. Smith*, xxxi. 162.

45. An omission by the deputy to pay for the services of the keeper is not such an omission as gives a remedy, under the statute, against the sheriff. *Kendrick v. Smith*, xxxi. 162.

46. A sheriff is not accountable in trespass for the act of C., his deputy, in serving an execution, although C. committed a fraud in the serving of the writ on which the judgment and execution were obtained, if, when serving such writ, C. was the deputy of another sheriff, and not of the defendant. *Wilton Manuf'g Co. v. Butler*, xxxiv. 431.

47. A sheriff is not liable on a contract, made by his deputy in his private and unofficial capacity, though such contract may have arisen out of some official act performed by his deputy. *Smith v. Berry*, xxvii. 298.

(b) *To creditors.*

48. Where the lien, by virtue of an attachment of chattels, is discharged by proceedings in bankruptcy, during the pendency of an action of replevin of the property attached, the creditor, by R. S. of 1841, c. 130, § 14, is entitled to receive from the officer interest at twelve per cent. per annum, on the value of the property, for so long as the service of his execution was delayed, for his own use. *Howe v. Handley*, xxviii. 241.

49. An officer is liable for taking an insufficient replevin bond, if the only surety never resided in this State. *Wilkins v. Dingley*, xxix. 73.

50. Neither by the common law, nor by R. S. of 1841, c. 104, § § 18 and 36, do actions of tort for the misfeasance of sheriffs or constables survive, as against their legal representatives. *Gent v. Gray*, xxix. 462. *Valentine v. Norton*, xxx. 194.

51. Nor do they survive in favor of the representatives of the party injured. *Valentine v. Norton*, xxx. 194.

52. Even if there were no judgment, the officer is accountable for property attached. *Brown v. Atwell*, xxxi. 351.

53. The approval by a plaintiff, as to the ability of the person taken as receiptor, does not exonerate the officer from effort to find the property that it may be sold on the execution, or from bringing a suit upon the receipt. *Allen v. Doyle*, xxxiii. 420.

54. A written approval, by a plaintiff or his attorney, of a receipt taken by the officer, and a delivery of it to the plaintiff, discharges the officer from liability to him for the goods. *Jewett v. Dockray*, xxxiv. 45.

55. Where one of two sureties upon a replevin bond was sufficient at the time of giving it, and is not shown to have since become irresponsible, an action cannot be maintained against the officer for taking an insufficient bond, although the other was insolvent when he signed the bond, and although they both moved out of the State before judgment was obtained. *Lord v. Bicknell*, xxxv. 53.

56. Where a laborer, having a lien for assisting to drive intermingled logs

of different ownerships, in order to enforce his lien, rightfully and seasonably attached a part of the logs; if the officer, seasonably having the execution, refuse to sell the logs thereon, he will be liable for such refusal, unless he show that such sale would take more in value of the logs of some one of the owners than his indebtedness under the lien amounted to. *Doyle v. True*, xxxvi. 542.

57. An action against an officer for neglecting to serve a writ cannot be supported without proof of loss sustained by such omission. *McNally v. Kerswell*, xxxvii. 550.

58. If it does not appear by the writ, against the administrator of an insolvent estate, that a lien-claim is sued for, no action can be maintained against the officer for neglecting to serve it. *McNally v. Kerswell*, xxxvii. 550.

59. Where property is sold under mesne process, under R. S. of 1841, c. 114, § 52, the payment of the proceeds, by the officer, to the attaching creditor's attorney, before judgment, will protect him against any suit by the creditor for a failure to apply the same to the execution issued on such judgment. The payment to the attorney is payment to the principal. *Ducett v. Cunningham*, xxxix. 386.

60. The law requires no useless ceremony. An officer is not liable, as for an omission of duty, for neglect to deliver an article which had been attached in the suit, but which could not legally be sold on the execution. *Taggard v. Buckmore*, xlii. 77.

See ASSUMPSIT, 11.

(c) *To debtors.*

61. Though a debt, for which property has been attached, may have been paid, yet the attaching officer cannot be charged as a wrongdoer for retaining the possession, until satisfactory evidence be given of the fact. *Wheeler v. Nichols*, xxxii. 233.

62. The officer is not liable to the judgment debtor for selling property at a postponed time, made by proclamation, without the posting of advertisements, if the postponement, both as to the time and mode of it, was made at the debtor's request. *Wilton Manuf'g Co. v. Butler*, xxxiv. 431.

(d) *To others.*

63. An officer is not authorized, by a precept against one person, to take the property of another. But a previous demand upon the officer may be necessary, before an action can be maintained, when the goods of the plaintiff, taken by the officer were so intermingled with those of the debtor as not to be distinguishable therefrom. It is not necessary that the property should be so distinctly marked, that an officer, by his own observation, would be able to perceive that it did not belong to the same individual, in order to make him liable. *WELLS, J.*, dissenting. *Tufts v. McClintock*, xxviii. 424.

64. The purchaser of personal property under attachment may maintain an action against the attaching officer, for an injury done by him to it after the purchase. *Richardson v. Kimball*, xxviii. 463.

65. If a surety, to pay the debt of his principal, send his money therefor, by the debtor, to the officer who holds a precept upon the demand, and the officer misappropriate the money, the surety, after having paid the debt to



the creditor, may maintain assumpsit against the officer, and without a special demand, although the officer, when he received the money, was not notified to whom it belonged. *Stetson v. Howe*, xxxi. 353.

66. Although the unlawful excess of fees, charged by an officer for serving the writ of a prior attaching creditor, has absorbed the debtor's property, to the injury of a subsequent attaching creditor, the latter cannot maintain an action against the officer for the injury. *Turner v. Norris*, xxxv. 112.

67. A town by-law, authorizing an officer to arrest and detain without warrant for the space of forty-eight hours, is repugnant to the Act of 1848, c. 71, § 2, and is no defence to an action against an officer for such unlawful detention. *Burke v. Bell*, xxxvi. 317.

68. To maintain an action for a false return, special damages sustained thereby must be shown. *Nash v. Whitney*, xxxix. 341.

See ACTION, 9.

#### (e) *Liability of Deputies to Sheriffs.*

69. For the expenses of defending a suit brought against a sheriff upon a personal contract of his deputy, the former has no remedy on the deputy or his sureties. *Smith v. Berry*, xxxvii. 298.

70. To suits brought against the sheriff for official acts of his deputy, it is proper that the sheriff should take care that no judgment be obtained wrongfully. For the expenses of so doing, if judiciously incurred in good faith, he has a remedy on the deputy's bond. *Smith v. Berry*, xxxvii. 298.

71. For such expenses, incurred before the suit upon the deputy's bond, the sheriff may recover, though in fact not paid by him until after bringing the suit. *Smith v. Berry*, xxxvii. 298.

71. For damages recovered against a sheriff and counsel fees by him incurred, on account of the misdoings of his deputy, he can only obtain indemnity by suit on the latter's bond. *Nutt v. Merrill*, xl. 237.

### III. JUSTIFICATION.

72. A precept or process, though voidable for irregularity and mistake, is a protection to the officer who serves it, if the magistrate, by whom it was issued, had jurisdiction of the subject matter. *State v. McNally*, xxxiv. 210. *Gurney v. Tufts*, xxxvii. 130. *Thurston v. Adams*, xli. 419. *Gray v. Kimball*, xlii. 299.

73. An officer may be protected in the service of an execution, although there were such irregularities in the writ and in the service of it, as, if pleaded, would have abated the suit; and although, for such irregularities, the judgment was afterwards reversed on writ of error. *Wilton Manuf'g Co. v. Butler*, xxxiv. 431.

74. If a magistrate's warrant show a want of jurisdiction, it can give no protection to the officer who serves it. *Gurney v. Tufts*, xxxvii. 130. *Thurston v. Adams*, xli. 419. *Vinton v. Weaver*, xli. 430.

75. An officer is not justified in entering a dwellinghouse for the purpose of seizing liquors, by a warrant under Act of 1853, c. 48, § 11, unless it is alleged in the warrant, either that the shop, for the sale of such liquors, is kept in the house, or a part of it; or that the preliminary testimony, pre-

scribed in said section, has been taken. *McGlinchy v. Barrows*, **XLI. 74.** *Jones v. Fletcher*, **XLI. 254.**

76. It must also be alleged that the liquors were intended by the owner for unlawful sale. *McGlinchy v. Barrows*, **XLI. 74.**

77. A warrant to search the dwellinghouse of a person only authorizes a search of the house in which such person lives; and not a house owned by such person, but occupied by another. *McGlinchy v. Barrows*, **XLI. 74.**

78. Under a warrant for the search of intoxicating liquors, an officer is justified in forcibly breaking and opening a railroad depot in which the liquors are stored, after the usual time for receiving and delivering goods at the depot, if such forcible entry is necessary to the execution of the warrant; and that, too, without first asking permission of the person in charge of the depot, to enter and search it. *Androscoggin Railroad Co. v. Richards*, **XLI. 233.**

79. A warrant commanding a search of a "dwellinghouse" will not authorize the search of a barn. *Jones v. Fletcher*, **XLI. 254.**

80. An officer is not liable for his official acts under a sufficient warrant, because the prosecution fails by reason of the repeal of the Act by virtue of which the warrant was issued. *Gray v. Kimball*, **XLII. 299.**

See WARRANT.

#### IV. INDEMNITY.

81. In a suit by a deputy, against a party who directed him to attach certain property, for which acts the sheriff was sued and held responsible, the deputy may recover the damages assessed against the sheriff, and the counsel fees incurred, although they are outstanding against him. *Nutt v. Merrill*, **XL. 237.**

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#### OFFICER DE FACTO.

See DEED, 38, 39, 40.

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#### ORDER.

1. When a person draws an order in favor of another, it is a presumption of law that the consideration for it was paid or secured at the time the order was drawn. *Smith v. Poor*, **XXXVII. 462.**

2. Hence, proof that the plaintiff drew an order in favor of the defendant, and that it was charged to the drawer and credited to the drawee, will not sustain either of the money counts. *Smith v. Poor*, **XXXVII. 462.**

3. An accepted unnegotiable order on a third person, given by a debtor to his creditor, for a precedent debt, is no defence to an action on such indebtedment, although the debtor has the original bill receipted, as paid by such order. *Jose v. Baker*, **XXXVII. 465.**

4. Payment of such a debt, by such an order, can only be proved by a special agreement to that effect. *Jose v. Baker*, xxxvii. 465.

### OUSTER.

See JOINT TENANTS, &c., 5, 6.

### OVERSEERS OF THE POOR.

1. Courts of law are alone authorized to determine the amount of damage which a minor, apprenticed by the overseers of the poor, is entitled to recover for ill-treatment suffered from his master. *Vinalhaven v. Ames*, xxxii. 299.

2. The overseers, in fixing the amount, would transcend their authority. *Vinalhaven v. Ames*, xxxii. 299.

3. A payment made to them, unless its amount had been settled in a suit at law, would not bar a claim against the master, made by the apprentice, when arrived at age. *Vinalhaven v. Ames*, xxxii. 299.

4. A note, given by the master and payable to the treasurer of the town, on an adjustment made by the overseers, in discharge of such claim, is without consideration. *Vinalhaven v. Ames*, xxxii. 299.

5. The overseers of the poor of Portland committed certain persons to the workhouse by a warrant which described them as persons, who, being "able of body to work, and not having estate or means otherwise to maintain themselves, refuse or neglect so to do, live a vagrant, dissolute life and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood:"—*Held*, that the causes alleged in their warrant were sufficient to give the overseers jurisdiction and authorized the commitment; and that towns, where persons so committed have their legal settlement, are liable for their support as paupers. *RICE, J.*, dissenting. *Portland v. Bangor*, xlii. 403.

6. Overseers, being under oath, are presumed to act with integrity until the contrary is shown. *Portland v. Bangor*, xlii. 403.

See PAUPER, 85—88.

### PARENT AND CHILD.

1. A mother, after the death of her husband, has no authority to assign, by parol, the services of her minor child, for the period of its minority, even though, by the contract, the compensation for services be made payable to the child. *Pray v. Gorham*, xxxi. 240.

2. Notwithstanding such contract, even made with the assent of the child, the child may leave the service of his employer, at any time, and recover

from him what his past services were reasonably worth. *Pray v. Gorham*, xxxi. 240.

3. In such a case, there is no validity in the ground, taken in defence, that it is not the child, but the mother, who is entitled to the wages. *Pray v. Gorham*, xxxi. 240.

## PARISH.

1. While a town constitutes but one parish, it may administer its municipal and parochial affairs under one organization; and while acting in this double capacity, it may appropriate any of its property to objects of a parochial or municipal character, which, after the dissolution of that union, by the constitution of a new parish, cannot be changed by one alone. *Boothbay v. Wylie*, xliii. 387.

2. Such appropriation, when distinctly made, is equivalent to a grant of the property to a specific use. And, where no such appropriation is made of the whole estate, the residue belongs to the town, and the parish can have title to no more than has been appropriated to their use. *Boothbay v. Wylie*, xliii. 387.

## PAROL REPRESENTATION.

A verbal representation or assurance concerning the character, credit, ability, trade or dealings of another, will not subject the party making it to an action for damages suffered thereby; the common law having been changed by R. S. of 1841, c. 136, § 3. *Hearn v. Waterhouse*, xxxix. 96.

## PARTITION.

- I. BY WHOM, AND OF WHAT, PARTITION MAY BE HAD.
- II. WHO MAY RESIST, AND ON WHAT GROUNDS.
- III. PROCEEDINGS.
- IV. EFFECT.

### I. BY WHOM, AND OF WHAT, PARTITION MAY BE HAD.

1. A right to partition is incident to all real estate, held in joint tenancy or tenancy in common. *Wood v. Little*, xxxv. 107.

2. In a petition for partition, a sole seizing in the respondent may be established by a possession commenced twenty years before the trial, though less than twenty years before the commencement of the process. *Saco W. P. Co. v. Goldthwaite*, xxxv. 456.

3. A petition for partition of land, described as bounded on the sea, or on a bay of the sea, is a petition for a division of the flats as well as of the upland. *Partridge v. Luce*, xxxvi. 16.

4. Where a division among the heirs of the realty had been made by parol, and they had subsequently occupied in severalty, an heir, who has sold and conveyed her part of the estate, so assigned by parol, may maintain this process for her share, after the title has re-vested in her. *Chenery v. Dole*, xxxix. 162.

## II. WHO MAY RESIST, AND ON WHAT GROUNDS.

5. A creditor's attachment of the estate of his debtor, held in common with others, cannot prevent the other part owners from procuring a partition of the estate. Nor will such partition vacate the attachment. *Argyle v. Dwinel*, xxix. 29.

6. A partition cannot be resisted on the ground, that the principal part of the estate, (as for instance a cotton factory,) is not divisible into the parts prayed for, without destroying it for the purposes for which it had been erected and maintained. *Wood v. Little*, xxxv. 107.

7. Where a co-tenant of land, after petitioning for partition, and prior to the interlocutory judgment of *fiat partitio*, has conveyed his interest, advantage can be taken only by plea in bar. *Partridge v. Luce*, xxxvi. 16.

8. But a sale, made after such interlocutory judgment, furnishes no objection to the partitioner's title. *Partridge v. Luce*, xxxvi. 16.

9. A division of the realty, by parol, among the heirs, and a subsequent occupation in severalty, interpose no obstacles to this process by either of the heirs. *Chenery v. Dole*, xxxix. 162.

10. And one who has conveyed all his interest, excepting his right in the dower, is rightfully made a party. *Chenery v. Dole*, xxxix. 162.

## III. PROCEEDINGS.

11. In a petition for partition, where commissioners are appointed before a default, and they make a return, which is resisted by a written motion, those who file the motion are not parties or subject to costs. *Moore v. Mann*, xxix. 559.

12. If there be error in the proceedings of commissioners under this process, in setting off lands, the remedy is by *certiorari*, and not by writ of error. *Dyer v. Lowell*, xxx. 217.

13. A co-tenant, thus injured, is not precluded from such remedy merely because he was not named in the petition for partition. *Dyer v. Lowell*, xxx. 217.

14. The commissioners cannot assign to a petitioner, a right of hauling lumber across the land assigned to his co-tenants; or of driving lumber on the stream through such land; or prescribe in what proportions, among the parties, the expense of maintaining the dam shall be paid; or that a dam shall be maintained at all. *Dyer v. Lowell*, xxx. 217.

15. If the estate be incapable of partition, the whole should be assigned to one of the co-tenants, upon the payment of money, as provided in R. S. of 1841, c. 121, § 25. *Dyer v. Lowell*, xxx. 217.

16. The proceedings of commissioners are erroneous, if they show merely an assignment to the petitioner of the number of acres he was entitled to, without showing in substance, that they were of average quality and value with the residue of the tract. *Dyer v. Lowell*, xxx. 217.

17. The commissioners' return, that they have given sufficient notice of the time and place, &c., to all concerned, &c., is not conclusive upon the Court; but it should state what they have done, and whether any, and what persons, (if any,) were known to them to be concerned, and resident within the State, and what notice was given to each. *Hathaway v. Persons unknown*, xxxii. 136.

18. When, in this process, a person interested is not named, and has had no notice or opportunity to appear and answer, he *may* be allowed, on motion, at any time before final judgment, to appear and defend, under R. S. of 1841, c. 121, § 9. *Field v. Persons unknown*, xxxiv. 35.

19. The granting of such motion is at the discretion of the Court; and, in the exercise of its discretion, it will refuse to grant the motion, unless made prior to the interlocutory judgment of *fiat partitio*. *Field v. Persons unknown*, xxxiv. 35.

20. Upon a division, it is not necessary that the parts be made equal in size or value, inasmuch as the party whose share is less in value may be compensated in money, under the award of the commissioners. *Wood v. Little*, xxxv. 107.

21. Under R. S. of 1841, c. 108, § 1, the Probate Court may make partition of real estate among heirs and devisees, though many years after the estate has been settled. *Earl v. Rowe*, xxxv. 414.

22. Where no dispute has been raised respecting the proportion, if any, to which an heir or devisee is entitled, partition may be made by the Judge of Probate, unless such proportion appear to *him* to be uncertain. And, if his opinion be erroneous, the remedy is by appeal. *Earl v. Rowe*, xxxv. 414.

23. On a petition for partition of land, described as bounded on the sea, or on a bay of the sea, it is the duty of the commissioners to divide the flats as well as the upland. And, unless they do so, their report will be re-committed for the purpose of having it done, unless it appear to the Court, that they are incapable of division. *Partridge v. Luce*, xxxvi. 16.

24. This process, not being a personal action, does not come within the provisions of R. S. of 1841, c. 120, §§ 10 and 15; and, not being a process to demand possession of land, is not embraced in c. 145, § 19; nor can the heirs or devisees of a sole petitioner for partition, after his decease be compelled to come into Court and prosecute the suit; but, unless they voluntarily appear after the death of the petitioner, the process must abate. *Dwinal v. Holmes*, xxxvii. 97.

25. In a petition for partition, if an issue is presented as to a piece of land, and the presiding Judge is unable to determine whether it is included in the petition or not he may authorize such an amendment or variance of the pleadings, as will prevent the jury from finding upon an immaterial issue. *Ham v. Ham*, xxxvii. 261.

26. Such amendments are allowed without costs to either party. *Ham v. Ham*, xxxvii. 261.

27. If parties to a suit put in issue a matter, which is incapable of being legally made so, the Court may direct the pleadings respecting it to be struck out or disregarded. *Ham v. Ham*, xxxvii. 261.

28. Where one of the commissioners in a warrant for partition, after it issued, declined to act, the appointment of another by the Court, with the certificate of the clerk, on such warrant, will authorize the substitute to act. *Parsons v. Copeland*, xxxviii. 537.

29. The interlocutory judgment affects only the *common* property, as it existed when the petition was filed. *Parsons v. Copeland*, xxxviii. 537.

30. Buildings, rightfully erected upon the common property, by one of the tenants in possession, for his own use, after a co-tenant has filed his petition for a partition, cannot be appraised, in estimating the value of the entire property, and thereby give to the petitioner a share of their value. And such an appraisal will render the proceedings erroneous. *Parsons v. Copeland*, xxxviii. 537.

31. In such petitions, a review may be granted by law, whenever the Court deem it reasonable and for the advancement of justice. *Wilbur v. Dyer*, xxxix. 169.

32. Where, after final judgment, a mistake in the proceedings of the commissioners was discovered, it was held *to be reasonable* that a review should be granted. *Wilbur v. Dyer*, xxxix. 169.

33. Commissioners have no power to determine any question of title to any of the property embraced in their warrant; and where they have exceeded their authority, their report should be re-committed. *Ham v. Ham*, xxxix. 216.

34. After the interlocutory judgment has been entered, no questions can be raised by any of the tenants, as to any betterments in the common property, while that judgment remains in force. *Ham v. Ham*, xxxix. 216.

35. Neither has the Act of 1855, c. 157, changed the law in that particular. *Ham v. Ham*, xxxix. 216.

See CERTIORARI, 12, 13.

COSTS, 22.

#### IV. EFFECT.

36. By R. S. of 1841, c. 121, §§ 33, 37, the judgment, in this process, is not conclusive upon an elder and better title than that of the person holding by virtue of the partition, unless against one who appeared and answered to the petition. *Argyle v. Dwinel*, xxix. 29.

37. Where a person is the owner of an undivided portion of lands holden in common, which portion is severed and set out under proceedings for partition, his title adheres to and follows the estate, and becomes limited by it. *Argyle v. Dwinel*, xxix. 29.

38. A judgment upon a verdict rendered in favor of petitioners for partition against persons unknown, is conclusive, so far as concerns the rights of those who did not appear and become parties to the proceedings, although the finding of the jury did not conform to the issue, and, by inadvertence, was not written out in form, before it was affirmed. *Foxcroft v. Barnes*, xxix. 128.

39. A judgment establishing the partition of lands, bars the legal possessory title of all who did become, or might have become, respondents. *Foxcroft v. Barnes*, xxix. 128.

40. A judgment under this process, cannot in any way prejudice the rights of strangers in other lands. *Hobbs v. Parker*, xxxi. 143.

41. A. owned land, and was also tenant in common with others, in adjoining land. The co-tenants instituted a process for partition, describing the common land by its true boundary. By mistake in the plan taken by order of the Court, the divisional line between the two lots was laid down erroneously, and, by means of that error, a part of A.'s own lot was assigned to one of the petitioners. In a real action, by such petitioner to recover said part, it is no answer to the title set up by A., that, by the erroneous line, a larger portion of the common land would fall to A. *Hobbs v. Parker*, xxxi. 143.

42. The whole object legally sought by this process, is a division of the land, between those who have title as tenants in common. *Tilton v. Palmer*, xxxi. 486.

43. To such processes, persons in possession by disseizin, (unless their occupation has ripened into a title) are not parties, and their equitable rights are not affected by the proceedings. *Tilton v. Palmer*, xxxi. 486.

44. An entry on the docket by such a disseizor, in such a process for partition, could not impair his equitable rights. *Tilton v. Palmer*, xxxi. 486.

45. In a writ of entry by the party to whom a portion of land had been set off in severalty:—*Held*, that if the tenant should prove that for more than six years prior to the filing of such petition for partition, he and those under whom he claimed had been occupying and improving the same portion of land, his right to betterments therein, would not be abridged by the partition. *Tilton v. Palmer*, xxxi. 486.

46. R. S. of 1841, c. 121, § 33, exempts from the operation of a judgment for partition, any person who did not appear and answer to the petition upon which the partition was ordered. *Larrabee v. Larrabee*, xxxiii. 100.

47. The name of an attorney, placed "for special purpose" under the name of a respondent in the docket entry of such a petition, does not constitute either an answer or an appearance, within the meaning of the statute. *Larrabee v. Larrabee*, xxxiii. 100.

## PARTNERSHIP.

- I. WHAT CONSTITUTES A PARTNERSHIP.
- II. WHAT WILL DISSOLVE A PARTNERSHIP.
- III. POWERS AND LIABILITIES OF PARTNERS.
- IV. PLEADINGS.
- V. EVIDENCE.

### I. WHAT WILL CONSTITUTE A PARTNERSHIP.

1. Whether a partnership existed, is an inference of law from the facts shown to have existed. *Dwinel v. Stone*, xxx. 384.

2. A mere participation in profit and loss, in the transactions of business, does not necessarily constitute a partnership. *Dwinel v. Stone*, xxx. 384. *Bancho v. Cilley*, xxxviii. 553.



3. It is essential, that there be a community of interest in the subject matter. *Tenet totum in communi et nihil separatim per se.* *Dwinel v. Stone*, xxx. 384. *Knowlton v. Reed*, xxxviii. 246. *Banchor v. Cilley*, xxxviii. 553. *Woodward v. Cowing*, xli. 9.

4. Also, that upon its dissolution by the death of one of the partners, the survivors become entitled to retain and dispose of the company effects for a settlement of its affairs. *Dwinel v. Stone*, xxx. 384. *Knowlton v. Reed*, xxxviii. 246.

5. Every community of interest does not constitute a partnership. *Knowlton v. Reed*, xxxviii. 246. *Woodward v. Cowing*, xli. 9.

6. Part owners or builders of ships are not from that fact, to be regarded as partners. *Mercantile Bank v. Cox*, xxxviii. 500.

7. Neither are co-mortgagees of ships to be any more treated or held as partners from holding security upon a part than if they owned the whole. *Mercantile Bank v. Cox*, xxxviii. 500.

8. Two persons keeping a public house together, making bills and purchases in the management of their house in the name of both, are not necessarily partners. *Banchor v. Cilley*, xxxviii. 553.

9. An association, each member of which agrees in writing to pay the sum subscribed by him for the purpose of building a meeting house, which, when completed, is to be the property of the subscribers in the proportions of the amounts invested respectively, is not a partnership. *Woodward v. Cowing*, xli. 9.

10. If parties have a distinct or independent, though undivided interest in the property, and neither can dispose of the whole property or act for the others in relation thereto, but only for his own share, they are not co-partners, and this Court has no equity power in such case. *Woodward v. Cowing*, xli. 9.

11. If one person advances funds and another furnishes his personal services, or skill in carrying on a trade or operation, and is to share in the profits, it amounts to a partnership. *Bearce v. Washburn*, xliii. 564.

## II. WHAT WILL DISSOLVE A PARTNERSHIP.

12. The death of one partner will operate at common law, as a dissolution of the partnership, however numerous the association may be, not only as to the deceased partner, but as between all the survivors. *Knowlton v. Reed*, xxxviii. 246.

13. A valid assignment of all the partnership estate, for the benefit of creditors of the firm, is *ipso facto*, a dissolution. *Simmons v. Curtis*, xli. 373.

## III. POWERS AND LIABILITIES OF PARTNERS.

- (a) AS IT RESPECTS THE PARTNERSHIP PROPERTY.
- (b) AS IT RESPECTS EACH OTHER.
- (c) HOW FAR ONE CAN BIND THE FIRM.

(a) *As it respects the partnership property.*

14. Where one of two partners has assigned his interest in the partnership

effects to his co-partner to secure the latter for debts due him from the former, but remains liable for the debts of the firm, and entitled to his share of any surplus, in an action in the name of the firm, brought for the benefit of the assignee alone:—*Held*, that, as against the assignee, the defendant cannot retain money paid to him, out of the partnership funds, upon a debt due to him from the other partner, if, at the time of receiving it, he knew the money belonged to the company, unless the assignee, at or before the payment, had assented thereto. *Foster v. Fifield*, xxix. 136.

15. After the dissolution of a co-partnership, it is regarded as continuing for the settlement of its affairs; and each partner, for that purpose, retains his former powers, unless a different agreement be made. *Gannett v. Cunningham*, xxxiv. 56. *Milliken v. Loring*, xxxvii. 408.

16. For an invasion of such property, an action may be maintained in the name of all the members of the firm. *Gannett v. Cunningham*, xxxiv. 56.

17. A note made payable to a partnership firm, for property belonging to the firm, is the property of the firm, though given after the death of one of the partners, upon a purchase from the survivor. *Thompson v. Lewis*, xxxiv. 167.

18. The share or aliquot part which a judgment debtor may have in the goods of a firm, of which he is the surviving partner, may be sold on execution against him; unless some interposing claim be made, in behalf of the firm, either by a creditor, or by the administrator of the deceased partner. *Thompson v. Lewis*, xxxiv. 167.

19. Unless such interposition be made, the sale need not be confined to the mere surplus interest, which the surviving partner might have in the goods after payment of all the partnership debts. *Thompson v. Lewis*, xxxiv. 167.

20. Of the methods by which such interposition, in behalf of the firm, may be effectually made, to prevent the surviving partner's share of the estate from being held for his private debt, either upon trustee process or upon execution. *Thompson v. Lewis*, xxxiv. 167.

(b) *As it respects each other.*

21. In a submission, by parties who had been co-partners, of all demands of every description, whether arising out of their business, as partners, or out of any other transactions, it does not belong to the referees to adjudicate upon the property belonging to the firm, or the debts due from the firm. *Hayes v. Forskoll*, xxxi. 112.

22. The interest, which the members of the company have in such matters, is not a demand by one against the other. *Hayes v. Forskoll*, xxxi. 112.

23. Although one of a firm, to whom a note, signed by the firm, is made payable, cannot maintain an action upon it against the makers, an indorsee may. *Davis v. Briggs*, xxxix. 304.

24. Under the equity jurisdiction of the Supreme Judicial Court may be brought all cases of partnership. *Knowlton v. Reed*, xxxviii. 246. *Woodward v. Cowing*, xli. 9.

25. In an action by a partner, as indorsee of notes given to another partner, upon a sale, by such other partner to the maker, of partnership property, the plaintiff stands in no better position to resist a claim of set-off, than the payee of the note himself would, if the action had been in his name. *Otis v. Adams*, xli. 258.

(c) *How far one can bind the firm.*

26. Where the general partner, (in a special partnership, subsisting and conducted in his name,) makes a general assignment of *his* property, for the benefit of creditors, without using any words to show that the partnership property was intended to be assigned, the partnership property is not thereby transferred. *Merrill v. Wilson*, xxix. 58.

27. In such case, one taking the property by purchase from the assignee, cannot hold it as against the creditors of the co-partners. *Merrill v. Wilson*, xxix. 58.

28. The indorsement of a writ by a co-partnership company, in the name of their firm, is sufficient to hold the persons composing the co-partnership. *Fisher v. Foss*, xxx. 459.

29. One partner has no authority to use the name of the firm, out of the scope of the co-partnership business, unless the consent or subsequent ratification of the other is obtained. *Rollins v. Stevens*, xxxi. 454.

30. Hence, one partner cannot bind the company as sureties, upon the paper of other persons. *Rollins v. Stevens*, xxxi. 454.

31. A valid title to a negotiable promissory note, payable to a co-partnership firm, may be transferred by an indorsement made in the name of the firm, by one of the co-partners, though after a dissolution of the co-partnership, if such dissolution was unknown to the indorsee. *Cony v. Wheelock*, xxxiii. 366.

32. A conveyance to one member of a co-partnership, made after the dissolution, in payment of a debt due to the firm, will enure to the benefit of the firm. *Gannett v. Cunningham*, xxxiv. 56.

33. Of two joint debtors, though not co-partners, if one give a note for the debt, signed in their joint names as co-partners, a ratification by the other gives validity to the note against both. *Waite v. Foster*, xxxiii. 424.

34. A subsequent promise by such other debtor to pay the note, made with a full knowledge of all the facts, is a ratification. *Waite v. Foster*, xxxiii. 424.

35. If one of the payees of a note, being partners, negotiated it, after the dissolution of the firm, without authority from his co-partners, their subsequent ratification will make the transfer valid, although indorsed for a purpose foreign to the business of the firm. *Leonard v. Wildes*, xxxvi. 265.

36. One of the partners may lawfully assign to a creditor of the firm, a demand due to the partnership, even after dissolution. *Milliken v. Loring*, xxxvii. 408.

37. After dissolution, each member has the same power as before, to collect debts, liquidate and settle accounts, and to apply the funds and effects to the payment of debts; and for that purpose the powers and duties of the partnership continue until the concerns of the association are closed up. *Milliken v. Loring*, xxxvii. 408. *Knowlton v. Reed*, xxxviii. 246.

38. The act of each partner in transactions relating to the partnership, is the act of all. *Knowlton v. Reed*, xxxviii. 246.

39. In ordinary cases, and in the absence of fraud on the part of the purchaser, each partner has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. *Knowlton v. Reed*, xxxviii. 246. *Woodward v. Cowing*, xli. 9.

40. Where property was wrongfully taken by partners and sold, a subse-

quent settlement with the owner for one-half, by one, will interpose no defence for the remaining value, in an action against the other. *McCrillis v. Hawes*, xxxviii. 566.

41. When a partnership has been dissolved and one of the partners has assigned all his interest in the book debts and demands of the firm to the other, with power to collect them for his own benefit, *he* cannot afterwards exercise any control over such debts, although one of them is against himself. *Davis v. Briggs*, xxxix. 304.

42. One partner, after the dissolution, has no power to make new contracts, or create new liabilities to bind the firm, without special authority to do so. Such authority may be inferred from all the circumstances of the case. *Simmons v. Curtis*, xli. 373.

#### IV. PLEADINGS.

43. The same person cannot be a plaintiff and defendant, at the same time, in a suit at law, where a contract is to be enforced. *Denny v. Metcalf*, xxviii. 389.

44. If an action be brought against two persons as partners, and one of the defendants and two others as partners in another concern, are summoned as trustees, they *cannot be holden* and *must* be discharged. *Denny v. Metcalf*, xxviii. 389.

45. For an invasion of partnership property, after a dissolution, an action may be maintained in the name of all the members of the firm. *Gannett v. Cunningham*, xxxiv. 56.

46. In an action of tort, wherein the defendants are described, and the wrongful act is alleged to have been done by them, as partners, and they severally plead the general issue, the allegation regarding the partnership is immaterial and need not be proved. *Head v. Goodwin*, xxxvii. 181.

47. The joint liability of partners is severed by their death, and a claim against their estate cannot be prosecuted against their administrator, in one action, although the same individual should administer on both estates. *McNally v. Kerswell*, xxxvii. 550.

#### V. EVIDENCE.

48. Where one of two partners has assigned his interest in the partnership effects to his co-partner to secure him for debts due him from the former, but remains liable for the debts of the firm, and entitled to his share of any surplus, his declarations are evidence against the firm, in an action in the name of the partnership, brought for the benefit of the assignee alone. *Foster v. Fifield*, xxix. 136.

49. In such suit, the partnership book, containing charges against one of the partners, for moneys paid by him upon his private debts, is admissible for the defendant, to prove that the other partner must have known of such payments, although some other payments may have been made, which were not entered on the book. *Foster v. Fifield*, xxix. 136.

50. A conveyance of land, belonging to a partnership, in which all the partners join, carries with it a presumption, in the absence of any proof, that

the consideration money went to the benefit of the firm. *Lincoln v. White*, xxx. 291.

51. A partnership was dissolved, upon an agreement, that one of the members should assume and pay the company debts. A creditor, upon being afterwards informed of the arrangement, replied that he was satisfied with it:—*Held*, that reply was not evidence, from which the jury could find that he had discharged the other member. *Chase v. Vaughan*, xxx. 412.

52. The declarations of one co-partner, made after the dissolution, concerning facts that had occurred prior to the dissolution, may be received in evidence to charge the partnership. *Hinkley v. Gilligan*, xxxiv. 101.

53. A suit by a surviving partner, for money paid upon a liability for the defendant, is not supported by proof, that the survivor paid the money, after the death of his partner, without also proving, that he paid it in behalf of the partnership. *Stevens v. Rollins*, xxxiv. 226.

54. It is a general rule, that the admissions of one co-partner, concerning the legitimate business of the co-partnership, are deemed the admission of each and all of its members. *Gilmore v. Patterson*, xxxvi. 544. *Fickett v. Swift*, xli. 65.

55. Such are not the less evidence, because found in answer to a bill in equity then before the Court. *Gilmore v. Patterson*, xxxvi. 544.

56. Evidence, that the defendants were doing business together as railroad contractors, under the firm and style of a partnership name; that they signed contracts, and notes and receipts by that name; that those notes were paid by them, unexplained, and unaccompanied by counter proof, is sufficient proof of a partnership. *Holmes v. Porter*, xxxix. 157.

57. Where the relation of partners is proved, although limited to a particular business, a note made in the name of the firm by one of the partners, is *prima facie*, for the debt of the firm. *Holmes v. Porter*, xxxix. 157.

58. A. and B., as counselors at law, commenced, at the request of D., and prosecuted to judgment, an action in which C. and D., alleged co-partners, were plaintiffs. They afterwards sued the latter for their fees, D. was defaulted; and C. denied that he was ever the partner of D., or authorized or was interested in the original suit:—*Held*, that the acts and doings of the plaintiffs in Court, without other proof of notice to defendant C. than arose merely from the long continuance of the suit in Court in the name of C. and D., were not sufficient evidence of partnership, or of promise on the part of C. to entitle the plaintiffs to recover. *Prentiss v. Kelley*, xli. 436.

## PART OWNERS.

Part owners are either joint owners or tenants in common, having a distinct, or at least an independent, although an undivided interest in the property, and can neither transfer or dispose of the whole property, or act for the others in relation thereto. They differ from partners in several respects. *Knowlton v. Reed*, xxxviii. 246.

See JOINT TENANTS.  
PARTNERSHIP.

## PATENT.

1. The power of determining the validity of a patent is exclusively confided to the Circuit Courts of the United States. *Elmer v. Pennell*, *XL*. 430.

2. In a suit upon a note given for the conveyance of a patent right, proof that such patent was void for being an infringement of a prior one, is not admissible, unless that fact has been determined by a Court of competent jurisdiction. *Elmer v. Pennell*, *XL*. 430.

3. Nor, in defence of such suit, can a mere hypothetical proposition, containing no issuable fact, be allowed to be proved. *Elmer v. Pennell*, *XL*. 430.

## PAUPER.

## I. SETTLEMENT.

## II. LIABILITIES OF TOWNS.

## III. ACTIONS.

## I. SETTLEMENT.

- (a) BY DERIVATION.
- (b) INCORPORATION, OR DIVISION, OR ANNEXATION OF TOWNS.
- (c) RESIDENCE FIVE YEARS.
- (d) DOMICIL.
- (e) WHEN PREVENTED BY RECEIVING RELIEF AS A PAUPER.
- (f) GENERALLY.

(a) *By derivation.*

1. Legitimate children shall follow and have the settlement of their father, if he have one within the State, until they gain one of their own. *Brewer v. East Machias*, *XXVII*. 489. *Augusta v. Kingfield*, *XXXVI*. 235. *Oldtown v. Falmouth*, *XL*. 106. *Milo v. Gardiner*, *XLI*. 549.

2. They cannot gain one of their own, while minors, unless they have been emancipated. *Brewer v. East Machias*, *XXVII*. 489.

3. If a father, having a legal settlement in a town, remove therefrom, leaving there a legitimate minor son, who remains there until of full age, such son will not thereby become emancipated, or acquire a settlement in that town during the time, in his own right. *Brewer v. East Machias*, *XXVII*. 489.

4. If the father have no settlement within the State, legitimate children follow that of their mother. *Dennysville v. Trescott*, *XXX*. 470. *Augusta v. Kingfield*, *XXXVI*. 235. *Eddington v. Brewer*, *XLI*. 462.

5. A minor child, who has been emancipated, gains no settlement from its mother, acquired after such emancipation. *Dennysville v. Trescott*, *XXX*. 470.

6. The Act of Feb'y 11, 1794, continued in force until 1821; and, under the former, no illegitimate child could have a derivative settlement, unless the mother herself, at the time of its birth, had a settlement. *Houlton v. Lubec*, *XXXV*. 411.

7. No settlement, acquired by the mother, after that time, could be imparted to such child. *Houlton v. Lubec*, xxxv. 411.

8. If the father of a pauper never had any settlement in the State, and has voluntarily and absolutely abandoned and deserted his wife and left the State; while he is living, she can gain no settlement independent of her husband, in her own right. *Augusta v. Kingfield*, xxxvi. 235.

9. And, if she marry another illegally, while her first husband is living, she can acquire no rights by *residence* under that association. *Augusta v. Kingfield*, xxxvi. 235.

10. Neither is her settlement, at the time of her marriage, lost or suspended by marrying one having no settlement in the State. *Augusta v. Kingfield*, xxxvi. 235. *Eddington v. Brewer*, xli. 462.

11. Where the mother of the pauper, at the time of her marriage, lived with her father, who had a settlement where they lived, the Court will not infer that the mother had a derivative settlement from her father. *Augusta v. Kingfield*, xxxvi. 235.

12. A married woman follows and has the settlement of her husband, if he has one within the State. *Eddington v. Brewer*, xli. 462.

(b) *Incorporation, or division, or annexation of towns.*

13. By the statute of 1826, dividing the town of Machias into several towns, a person born within its territorial limits, though prior to its incorporation, and removed therefrom at the time of said division, is held to have a settlement in that one of the towns, within the territorial limits of which he was born. And this rule applies to persons whose settlement was merely derivative. *Calais v. Marshfield*, xxx. 511.

14. By the special Act of 1842, c. 9, § 3, by which the town of Auburn was incorporated wholly from a portion of Minot, a person, whose settlement in Minot had been gained by a residence in that part of it, made into the new town, has his settlement in Auburn, if he have not gained a new one elsewhere. *Winthrop v. Auburn*, xxxi. 465.

15. The Act of 1842, annexing a part of Berlin to Phillips, and annulling the incorporation of the residue of Berlin, so far as affects the settlement of persons who had resided in Berlin, is to be considered as a division of it, and not as an annexation of a part of it. *Livermore v. Phillips*, xxxv. 184.

16. *It seems*, that "annexation," in its legal sense, is where the town, from which the part annexed was taken, was left as an existing corporation. A "division" is otherwise. *Livermore v. Phillips*, xxxv. 184.

17. The settlement of persons residing on territory set off from one town, and not "incorporated into another," is not changed by such dismemberment. *Weld v. Carthage*, xxxvii. 39.

18. Where an Act, for the division of a town and incorporation of a new one, authorized the County Commissioners to appoint a committee to determine the value of certain property named, &c., &c., and also, "to determine all privileges and burdens, that justice may be done between said towns:"—*Held*, that the committee had no power to decide respecting the support or settlement of paupers. *Holden v. Brewer*, xxxviii. 472.

19. When a town is divided by a Legislative Act, a pauper residing therein, without any settlement in this State, must be supported by that town in

which his residence may be established at the time of the division. *Holden v. Brewer*, xxxviii. 472.

20. The annexation of a small portion of the territory, (containing fifteen polls,) of one town to another adjoining, is not such a division as is contemplated by the R. S. of 1841, c. 32, part 4, § 1. And such annexation transfers the settlement of no persons, unless they have a settlement in the town from which the territory is taken, and actually dwell on the territory at the time of its separation. *APPLETON, J.*, dissenting. *Starks v. New Sharon*, xxxix. 368. *Brewer v. Eddington*, xlii. 541.

21. A., before her marriage, had a settlement in the westerly part of a town. Immediately after her marriage, (which was with an alien, having no settlement in the State,) they removed to, and resided in the easterly part of the town; while residing there, that portion of the town was incorporated into a new town:—*Held*, that her settlement was in the new town. *Eddington v. Brewer*, xli. 462.

22. The incorporation of a new town from parts of other towns, “with all the persons having a legal settlement therein,” includes all who had acquired their settlement in the territory of which the new town is composed, although removed therefrom at the time of the incorporation. *Ripley v. Levant*, xlii. 308.

23. To set off a part of one town and annex it to another, has the same effect in regard to the legal settlement of persons residing on the territory annexed, as to incorporate a new town. *Ripley v. Levant*, xlii. 308.

24. By R. S. of 1841, c. 32, a manifest distinction exists between the division of a town and the incorporation of a new town from parts of other towns, in regard to the rights of settlement of the inhabitants, under certain circumstances. The *division* fixes the settlement of persons, absent at the time, in that part in which was their last dwelling-place. The incorporation places in the new town, the settlement of those who *actually* dwelt and had their homes within its limits at the time of incorporation. *APPLETON, J.*, dissenting. *Ripley v. Levant*, xlii. 308.

25. A. had his settlement in the town of B., and removed therefrom after having resided for a few weeks in a portion of the town which was subsequently annexed to other territory and incorporated into a new town:—*Held*, that A., having acquired his settlement in that part which remained the town of B., and having had no dwelling-place and home within the bounds of the new town when incorporated, his legal settlement was in B. *Ripley v. Levant*, xlii. 308.

26. D. being without family and having no legal settlement in this State, commenced work for A., as a laborer, on his farm, in the town of B., where he continued for the space of six years, after which he was supported during the ten succeeding years by the town at its poor-house. A portion of B., including the site of its poor-house, but not including the residence of A., was then incorporated into a new town. Subsequently, another portion of B., including the residence of A., was annexed to E.:—*Held*, that the pauper, by living in the poor-house, did not have such a home in the new town as to fix his settlement therein; and that he did not actually dwell and have his home in that part of B. which was annexed to E. in any such sense as to transfer his settlement to that town. It therefore remained in B. *Brewer v. Eddington*, xlii. 541.

27. Under the latter clause of the fourth mode of gaining a settlement in a town, the question of settlement in the new town, depends upon the fact of



an actual home. A poor-house cannot be regarded as having the characteristics of a statute home. *Brewer v. Eddington*, XLII. 541.

28. It is competent for the Legislature, in annexing a part of one town to another, to provide that persons, having a legal settlement therein, but absent or residing elsewhere at the time, shall there-afterwards have their settlement in the town to which such part is annexed. *Wilton v. New Vineyard*, XLIII. 315.

29. By special Act of 1856, c. 503, persons, then having a legal settlement in that part of Strong set off to New Vineyard, absent or residing elsewhere at the time, acquired their settlement in the latter town. *Wilton v. New Vineyard*, XLIII. 315.

(c) *Residence five years.*

30. Supplies furnished a minor child, without the knowledge or consent of the father, while the father is of ability to support the child, will not prevent the father from gaining a settlement by five years residence. *Bangor v. Readfield*, XXXII. 60.

31. Insanity, occurring after a residence has been established, will not prevent the acquisition of a settlement, if the residence be continued five years without the receiving of pauper supplies. *Machias v. East Machias*, XXXIII. 427.

32. A residence of five years together, of a person twenty-one years of age, is required to gain a settlement. *Brewer v. Linnaeus*, XXXVI. 428.

(d) *Domicil.*

33. A domicil, being once fixed, continues until proved to have been actually changed. *Brewer v. Linnaeus*, XXXVI. 428.

34. The residence of the wife, (her husband being of full age,) is *prima facie* evidence of his domicil. *Brewer v. Linnaeus*, XXXVI. 428.

35. Absences, for longer or shorter periods, for temporary purposes, do not change the domicil. *Brewer v. Linnaeus*, XXXVI. 428.

36. An enlistment and service for five years in the army, do not necessarily show a change of domicil. *Brewer v. Linnaeus*, XXXVI. 428.

37. To establish a residence within the meaning of the statute, there must be personal presence without any present intention to depart; and to break up such residence when once established, there must be departure with intention to abandon. *Warren v. Thomaston*, XLIII. 406.

38. The fact of abandonment depends upon the intention of the pauper when he departs; and whether his anticipations of business fail, so that he returns sooner or later, is wholly immaterial. *Warren v. Thomaston*, XLIII. 406.

39. The word "domicil" is not used in the statute, but, when used, is synonymous with residence and home; and a different meaning is unauthorized. *Warren v. Thomaston*, XLIII. 406.

40. To acquire and maintain a residence or home, it is not necessary that a person be at all times personally present in such place, or have a particular house to which he may resort as matter of right. *Warren v. Thomaston*, XLIII. 406.

See PAUPER, 9.

(e) *When prevented by receiving relief as a pauper.*

41. Supplies, furnished to a minor child, without the knowledge or consent of the father, while he is of ability to support the child, will not prevent the father from gaining a settlement by five years residence. *Bangor v. Readfield*, xxxii. 60.

(f) *Generally, and herein of emancipation.*

42. A mother, who has entered into a second marriage, has power, with the consent of her husband, to emancipate a minor child of her first marriage. *Dennysville v. Trescott*, xxx. 470.

43. Such emancipation may be inferred from the conduct of the parties. *Dennysville v. Trescott*, xxx. 470.

44. An alien, according to our statute, may gain a settlement in this State. *Calais v. Marshfield*, xxx. 511.

45. When minor children are separated from their father and maintained by the town of their legal settlement, by reason of his inability to support them, such separation is not to be considered as an abandonment of them or him. Such support of his children is supplies indirectly furnished him within the sixth clause of R. S. of 1841, c. 32, § 1. *Sanford v. Lebanon*, xxxi. 124.

46. Desertion by a minor child from his father's home, with vagrancy and crime, does not constitute emancipation, so long as the father has not relinquished his right of control, nor consented that he should act for himself independently of the father. *Bangor v. Readfield*, xxxii. 60.

47. Under the statute, an insane person may gain a settlement in any town, in his own right, though carried to such town while insane, and without the concurrence of a guardian. *New Vineyard v. Harpswell*, xxxiii. 193.

48. No acts or admissions of the overseers of the poor of a town can change the legal settlement of a pauper. *New Vineyard v. Harpswell*, xxxiii. 193.

49. Evidence, that a person, after performing various jobs of labor in the line of his business, in the same and neighboring towns, occasionally returned to the house of a particular family, where he stayed while out of employment, has no tendency to prove that he had acquired a residence in that family. *Corinth v. Lincoln*, xxxiv. 310.

50. Where the only evidence to establish the residence of a pauper, showed that his home was in a particular family, it is not erroneous for the Judge to instruct the jury, that, in order to justify them in finding a residence, it must be proved that he was a member of that family. *Corinth v. Lincoln*, xxxiv. 310.

51. No one can become a member of another's family, so as thereby to gain a residence under the pauper laws, unless voluntarily, and by consent of the family. *Corinth v. Lincoln*, xxxiv. 310.

52. If, while a member of such family, pauper supplies are furnished to the family, it will be considered they are furnished him, though of full age, and not subject to the control of any of the family. *Corinth v. Lincoln*, xxxiv. 310.

53. Where the only evidence of supplies having been furnished to one who had called for relief, was, that such articles were sent by the overseers, it is

for the jury to decide whether they were received. *Corinth v. Lincoln*, xxxiv. 310.

54. An arrival at the age of twenty-one years does not emancipate a child, resident in his father's family, and *non compos mentis*. *Tremont v. Mt. Desert*, xxxvi. 390.

55. Supplies furnished by a town for the support of such child, though more than twenty-one years of age, render the father constructively a pauper. *Tremont v. Mt. Desert*, xxxvi. 390.

56. A minor child, of parents who are paupers, bound to service by the selectmen, by written indentures, until twenty-one years of age, is not thereby emancipated. *Oldtown v. Falmouth*, xl. 106.

See OVERSEERS, &c., 5.

## II. LIABILITIES OF TOWNS.

57. In each town, it is the duty of the overseers to provide for the immediate comfort and relief of all persons residing or found therein and falling into distress and needing immediate relief there, though having a lawful settlement in another place. *Brown v. Orland*, xxxvi. 376.

58. Towns are required to relieve and support persons who are in need, residing therein, and having no settlement in this State. *Holden v. Brewer*, xxxviii. 472.

59. When such persons remove into another town and fall into distress, no further obligation is imposed upon the town who first furnished the relief. *Holden v. Brewer*, xxxviii. 472.

60. Where a pauper, whose settlement is in another town, is adjudged insane and sent to the hospital, notice given of the expenses of commitment and payment thereof, will render the town where he has his settlement liable to reimburse them as for any other supplies. *Eastport v. Belfast*, xl. 262.

## III. ACTIONS.

- (a) BETWEEN TOWNS.
- (b) NOTICE.
- (c) INDIVIDUALS AGAINST TOWNS.
- (d) TOWNS AGAINST INDIVIDUALS.

### (a) *Between towns.*

61. At a trial, between towns, of the settlement of a pauper, the declarations of the pauper respecting his intention, in going from one place to another, made days before he left, unaccompanied by any acts, are inadmissible. *Bangor v. Brunswick*, xxvii. 351.

62. In such trial, it is not necessary to prove by the *record*, that the persons acting as overseers were legally such. It is sufficient to show that they acted as such. *Brewer v. East Machias*, xxvii. 489.

63. The opinion or adjudication of overseers that the supplies, furnished by them to an alleged pauper of another town, were necessary, although made in good faith, is not conclusive of that fact in a suit for their recovery. *Thomaston v. Warren*, xxviii. 289.

64. It is within the scope of the official powers of overseers, to adjust and pay claims against their town, made for supporting any of their paupers by another town. *Harpwell v. Phippsburg*, xxix. 313.

65. In an action between towns for the expense of a pauper, evidence of a former suit, for previous expenses of the same pauper, and of payment of the same by the overseers of the defendant town, is admissible. *Harpwell v. Phippsburg*, xxix. 313.

66. Where an action was commenced between towns for the support of a pauper, and a verdict was returned for plaintiffs; and while that action was pending, on a motion for a new trial, another suit was instituted between the same parties, for the support of the same pauper, in which was a verdict for the defendants, and exceptions were filed; and afterwards the first verdict was set aside:—*Held*, that however the first action might be decided, the Court could only render such judgment in the latter action, as the exceptions authorized. *Bangor v. Brunswick*, xxx. 398.

67. Whether, on the new trial in the first suit, the question of the settlement of the pauper can be raised, *quere*: *Bangor v. Brunswick*, xxx. 398.

68. Proof that a person was residing in a certain town a few months before, and a few months after, its incorporation, is not *prima facie* proof that he was resident there upon the day of its incorporation. *Kirkland v. Bradford*, xxx. 452.

69. Where a pauper, belonging to another place, is supplied within and at the expense of the plaintiff town, under a contract with an individual to support all such paupers as the town should be obliged to support, such supplies are furnished by the town; and the plaintiff town may recover them against defendant town, although the recovery is for the benefit of the contractor. *Calais v. Marshfield*, xxx. 511.

70. In an action between towns for supplies furnished a married woman, it is no defence, that the notice merely alleged that the wife of A. B. had become chargeable, without stating that A. B. had become chargeable. *Sanford v. Lebanon*, xxxi. 124.

71. R. S. of 1841, c. 32, § 30, provides that, in a suit between towns for the support of a pauper, a "recovery" shall bar the town against which it was had, from disputing the settlement of the same pauper with the prevailing town in any future action brought for his support:—*Held*,—

1st. That the obtaining judgment by the defendant town against the plaintiff town in such action is a recovery against the plaintiff town;—

2d. That each party is bound by such recovery, from further contesting the pauper's settlement with the other; and—

3d. That such recovery estops the plaintiffs as well in a second suit brought before the decision of the first suit, as in any other subsequent suit. *Oxford v. Paris*, xxxiii. 179. *Bangor v. Brunswick*, xxxiii. 352.

72. In the action last tried, though first commenced, the record of such judgment cannot be excluded by an agreement in writing, (made when the last commenced action was under advisement upon exceptions,) that the first commenced action should stand on as favorable grounds as if tried at the term when such agreement was made. *Bangor v. Brunswick*, xxxiii. 352.

73. When a town, in which an insane person was resident, has incurred expense in maintaining him at the Insane Hospital, such town, in order to recover for such expenses against the town of the pauper's settlement, must notify the defendant town in the mode prescribed in the general pauper law. *Cooper v. Alexander*, xxxiii. 453.

74. In a question as to the settlement of a pauper, his declarations are admissible in evidence, to illustrate any acts by him done, tending to establish the issue. *Cornville v. Brighton*, xxxix. 333.

75. Thus, when about going from the town where he was at work, to the town where his former settlement was established, his declarations of his purpose in that journey are admissible. *Cornville v. Brighton*, xxxix. 333.

76. And although the interrogatories drawing out his declarations may be general, and when standing alone appear to refer to any departure of the pauper, and therefore in itself inadmissible, yet, if it appears from the answer and from the proceedings, to have had reference *only* to a journey to the town interested in the question, it furnishes no ground for exceptions. *Cornville v. Brighton*, xxxix. 333.

77. A. and his wife and children, while residing in Bangor, were furnished with supplies as paupers, the husband having no settlement in the State, and the wife and children having their settlement in the town of Hampden:—*Held*, that the latter town was liable for such part of the supplies as were used by the wife and children, but not for such as were used for the husband. *Bangor v. Hampden*, xli. 484.

78. In order for one town to recover in an action against another, for supplies to paupers, the jury must be satisfied that the alleged paupers had fallen into distress, and needed immediate relief, and that the supplies were necessary. *Bangor v. Hampden*, xli. 484.

79. What may have been the cause of their distress and want in such case, is immaterial. *Bangor v. Hampden*, xli. 484.

80. The cause of action by one town against another, for the support of a pauper, accrues at the time of the delivery of the notice, that the expenses have been incurred. And the statute of limitation begins then. *Cutler v. Maker*, xli. 594. *Vide* LIMITATION, 8, 9.

#### (b) Notice.

81. In a claim by one town against another for supplying certain paupers, the plaintiffs notified the defendants, that J. C., wife, and their seven children, naming them all, had fallen into distress, &c. Defendants replied, acknowledging the receipt of the notice “touching the C. family,” and denying that “C. had a settlement in the defendant town:—*Held*, that the defendants were not estopped to deny the settlement of the wife and children in their town. *Palmyra v. Prospect*, xxx. 211.

82. A notice, valid as to one pauper, is not rendered invalid by being united with a defective notice respecting other paupers. *Sanford v. Lebanon*, xxxi. 124.

83. Under the general pauper law, the notice must be signed in the name of the overseers, or of some one of them in their behalf. A notice, signed in the name of some other person in their behalf, is not sufficient. *Cooper v. Alexander*, xxxiii. 453.

84. “Selectmens’ office, K., Feb. 1, 1857.—Gents., L. S. of B., has become chargeable in this town as a pauper. You are hereby notified, that we are supporting her at your expense and shall continue to do so, until she is removed or otherwise provided for.—Per order of the board of overseers of the poor of the town of K., J. H., chairman. To the overseers of the poor of B.,” is a sufficient notice. *Cutler v. Maker*, xli. 594.

(c) *Individuals against towns.*

85. If the overseers of the poor do not provide for the immediate comfort and relief of all persons residing in their town, or found therein and falling into distress and needing immediate relief there, after notice that immediate relief is needed, any person may furnish such relief and recover for the same in an action against the town, although the plaintiff knew that the town, or an individual, bound to support the pauper, had made at another place, suitable provision for that purpose, if the pauper, while supported by such person, was too sick to bear removal. *Brown v. Orland*, xxxvi. 376. *Gross v. Jay*, xxxvii. 9.

86. An indebtedness by the plaintiff to the pauper, will not defeat a recovery in such action against the town. *Brown v. Orland*, xxxvi. 376.

87. When provision is made upon notice and request to the overseers, the liability of the town to pay such person ceases. *Gross v. Jay*, xxxvii. 9.

88. If the person, making the request, is employed by the overseers to keep the pauper for a limited time, and he continues to support the pauper after the time agreed upon has elapsed; the town will not be liable for such support after the termination of their contract, without a new notice and request, although the overseers knew the alleged pauper was unable to support himself. *Gross v. Jay*, xxxvii. 9.

(d) *Towns against individuals.*

89. When persons, having settlements in other towns, fall into distress and need immediate relief, the overseers of the poor are not under the necessity of inquiring or considering whether such persons have or have not property, for any other purpose than to enable them to determine whether they have actually fallen into distress, and need immediate relief. It is the design of the law, that relief should be rendered those found in that condition; and if they have property, the amount expended for their relief may be recovered of them, by the towns in which they have their legal settlement. *Brewer v. East Machias*, xxvii. 489.

## PAYMENT.

- I. WHAT IS A PAYMENT, AND ITS EFFECT.
- II. APPROPRIATION OF PAYMENT.

See VOLUNTARY PAYMENT.

## I. WHAT IS A PAYMENT, AND ITS EFFECT.

1. Payment, made before a note has become payable, to the only authorized agent of the holder, has the same effect as if made to the holder personally. *Patten v. Fullerton*, xxvii. 58.

2. Where a practising attorney, in the transaction of business, takes a negotiable note to his principal, payments made on such note to the attorney in specific articles instead of money, would not bind the principal, as a general

rule. But, if one such payment be received by the principal, and the note is still suffered to remain in the attorney's possession, without objection to the attorney or debtor, such payments would discharge the note the same, as if made in money. *Patten v. Fullerton*, xxvii. 58.

3. The payment of a part only of a sum due, at the time and place of payment, on a promise to cancel the whole claim, discharges the indebtedness to the amount of the sum paid and nothing more, there being no consideration for the promise. The least consideration, however, in such case, is sufficient. *Hinkley v. Arey*, xxvii. 362. *White v. Jordan*, xxvii. 370.

4. The receiving of a town order by the collector in payment of taxes, is not of itself, a payment of the order. *Willey v. Greenfield*, xxx. 452.

5. Upon the settlement of an account, the allowance of an item of charge by the guardian, for his negotiable note, given to the ward for a specified sum, is a payment made to the ward. *Pierce v. Irish*, xxxi. 254.

6. Such a charge is lawfully allowed, when the Judge of Probate is satisfied it was the intention of the ward to receive the note as a payment. *Pierce v. Irish*, xxxi. 254.

7. Where the amount of a note has been lodged by a debtor in the hands of a third person, upon a stipulation by the latter that he would therewith pay the note, and he afterwards purchased the note, the transaction constitutes a payment. *Williams v. Thurlow*, xxxi. 392.

8. And it is equally a payment, whether the said amount had been received by such purchaser in cash or real estate at a stipulated price. *Williams v. Thurlow*, xxxi. 392.

9. Where A. obligated himself to pay money to another, so soon as paid to him by a third person, the taking by him of a new note, of such third person, upon an extended pay-day, is a payment received by A. *Greenleaf v. Hill*, xxxi. 562.

10. A creditor of an intestate, who has received for his debt, a negotiable note against a third person, of the same amount, secured by a mortgage of land, has no further interest in the estate, although the maker became insolvent, and the mortgage was valueless. *Rawson v. Piper*, xxxiv. 98.

11. Where money for the payment of a debt had been left with a depository for the creditor, and the debtor, with a full knowledge of all the circumstances, had ratified the act of deposit, it will be deemed a payment. *Ingalls v. Fiske*, xxxiv. 232.

12. If negotiable paper be received for an existing debt, the presumption is, that it was taken as a payment of the debt. *Fowler v. Ludwig*, xxxiv. 455.

13. This presumption may be rebutted by proof of circumstances, showing that it was not the creditor's intention to receive it as payment. *Fowler v. Ludwig*, xxxiv. 455.

14. Such a misapprehension, by a creditor, of his rights, as would repel the presumption of payment, must be a misapprehension arising from a want of full knowledge of the facts. *Fowler v. Ludwig*, xxxiv. 455.

15. If the negotiable paper accepted is not binding upon all the parties under previous absolute liability, the presumption may be considered as repelled. *Fowler v. Ludwig*, xxxiv. 455.

16. A negotiable order, accepted by the creditor of a corporation for a previous debt, is presumed to be payment, although drawn by the prudential

officers of the corporation upon its own treasurer. *Fowler v. Ludwig*, xxxiv. 455.

17. Where plaintiff's claim, in assumpsit, is reduced below twenty dollars, by evidence in *payment pro tanto*, and not in set-off, he is restricted to quarter costs. *Dodge v. Swazey*, xxxv. 535.

18. Until the expiration of twenty years from the recovery of a judgment, there arises, from lapse of time, no degree of presumption of payment. *Thayer v. Mowry*, xxxvi. 287.

19. For an agreement by a judgment creditor, that he would allow, upon the judgment, the amount, which, prior to the judgment, he had received toward the debt, such receipt of the money is a sufficient consideration. And in a suit upon the judgment, the jury may treat the amount received as a payment upon the judgment. *Thayer v. Mowry*, xxxvi. 287.

20. If a surety, when paying the debt of another, shall receive from a third person a note or contract to pay him the amount so paid, such note or contract is presumed to have been a payment. *Parkhurst v. Jackson*, xxxvi. 404.

21. The absence of previous or contemporaneous assent to a transaction, renders its ultimate validity contingent, it being doubtful whether the necessary ratification will ever be given. *Fisk v. Holmes*, xli. 441.

22. A subsequent assent does not relate back so as to prejudice a party, whose conduct has been guided by the transaction as it actually occurred. Still less, will a party be injuriously affected by a subsequent assent to, or affirmation of an act, if the party assenting or affirming had dis-affirmed and repudiated it, when the act was first communicated. *Fisk v. Holmes*, xli. 441.

23. When a foreclosure is perfected, and the mortgaged premises exceed in value the notes secured, they must be deemed to have been paid; and no action can be maintained upon them. *Hurd v. Coleman*, xlii. 182.

24. Several persons paid for a mercantile adventure, by a draft on time, to which draft all were parties. Subsequently, by written contract, each agreed to pay his proportion of the draft at maturity, in consideration of being entitled to an equal share of the profits. The adventure was not successful. The draft was not paid at maturity, and suit was brought by the indorsers, who had been obliged to take it up, against the acceptors. Both plaintiffs and defendants were parties to the adventure:—*Held*, that the contract was neither payment of the draft nor a discharge of the parties to it; and that the action could be maintained, as also an action upon the contract.—*Held also*, that the contract is evidence of what each agreed to pay in the adventure, and is equivalent to a receipt from the plaintiffs for their proportion of the drafts, and reduces, by so much, the amount to be recovered by them. *Crooker v. Tallman*, xlii. 329.

See *BILLS*, &c. 32, 37, 116, 156.

## II. APPROPRIATION OF PAYMENT.

25. In an action by two counselors and attorneys, as partners, they cannot change the appropriation of money paid to them after the partnership existed, and credited at the time on the partnership account, after the lapse of years,



to an appropriation to the payment of a prior claim of one of the partners, rendered in the same suit. *Codman v. Armstrong*, xxviii. 91.

26. In a suit upon a witnessed note, an account barred by the statute of limitations, but of about the same date with the note, and larger in its amount, was filed in set-off:—*Held*, that, as a set-off, the law would not sustain it, nor allow so much of it to be proved as to balance the note. Neither will the law appropriate the account to the payment of the note, nor presume, after any lapse of years, that the plaintiff had so appropriated it. *Nason v. McCulloch*, xxxi. 158.

27. Where a debtor, owing several debts to the same person, pays him money, and neither of the parties make any appropriation of it, the law applies it to the oldest debt. *Milliken v. Tufts*, xxxi. 497.

28. A creditor cannot make a valid appropriation of a payment, at a time when a controversy thereon has arisen between himself and the debtor. *Milliken v. Tufts*, xxxi. 497.

29. Where an insurance has been effected upon real estate mortgaged to secure several notes, and the mortgagee has received money for a loss by fire, such money is to be appropriated first to the interest on all the notes overdue, and the surplus to the principal of the notes, in the order of their respective pay-days. *Larrabee v. Lumbert*, xxxii. 97.

30. A partial payment, made by a party who was indebted severally and also jointly with another, to the same creditor, for items of book charges, is to be applied upon the several debt, unless a different appropriation was intended at the time of the payment. *Livermore v. Claridge*, xxxiii. 428.

31. Though the creditor, in such case, have credited the money to the joint account, he is not thereby precluded to transfer it to the several debt, by proving, that, as to a part of the items, he, by the unauthorized pretensions of the party paying the money, was deceptively led to charge the joint, instead of the several account. *Livermore v. Claridge*, xxxiii. 428.

32. A debtor, when paying money, has the right to appropriate it to any one of the creditor's demands. *Treadwell v. Moore*, xxxiv. 112. *Witherell v. Joy*, xl. 325.

33. If he appropriate it, though to a claim arising for a violation of law, the Court cannot afterwards transfer its appropriation to a debt lawfully existing. *Treadwell v. Moore*, xxxiv. 112.

34. But, if no appropriation be made, the law will apply it to that one of the creditor's claim which is legal. *Treadwell v. Moore*, xxxiv. 112.

35. Partial payments on a running account, without special appropriation, are to be applied in discharge of the earliest items. *Thurlow v. Gilmore*, xl. 378.

36. And this rule is applicable where such payments are made by one of full age, upon an account, commencing before and terminating after, the debtor's majority. *Thurlow v. Gilmore*, xl. 378.

## PEDDLING AND PEDDLERS.

1. A person, who rightfully obtained a license to peddle, is not liable to a penalty for not having one, though the commissioners had omitted to complete their records of it. *Foster v. Dow*, xxix. 442.

2. Unexpired licenses, under an Act which is repealed, are not annulled by the repeal, when in conformity with existing laws. *Foster v. Dow*, xxix. 442.

3. The traveling from place to place, though within the same town, for the purpose of vending goods, wares and merchandize, without having obtained license therefor, is a violation of the Acts of 1846, c. 200, and of 1848, c. 63. *Andrews v. White*, xxxii. 388.

## PENALTY.

1. Chapter 148, § 49, of R. S. of 1841, is a remedial and not a penal statute. *Philbrook v. Handley*, xxvii. 53. *Thatcher v. Jones*, xxxi. 528. *Frohook v. Pattee*, xxxviii. 103.

2. Where the selectmen omit to perform an official duty, and from the facts presented, their motives are so explained, as to show that it was neither unreasonable, corrupt, nor wilfully oppressive, no penalty will be incurred. *Harlow v. Young*, xxxvii. 88.

3. Thus, where the selectmen omitted to appoint a sealer of weights and measures, and it appeared that the inhabitants, by their vote, did not wish any appointed; and the treasurer of the town had never provided any weights or measures, no penalty is incurred. *Harlow v. Young*, xxxvii. 88.

4. A penal statute is such only as would authorize the commencement of a suit, indictment or information, in the name and for the use of the State, at any time within two years, unless previously a prosecution had been commenced within one year by an individual. *Frohook v. Pattee*, xxxviii. 103.

5. In a penal action, one offence is punishable only by one suit, and, therefore barred by a former verdict. *Frohook v. Pattee*, xxxviii. 103.

6. R. S. of 1841, c. 158, § 17, imposes a penalty of not more than \$30, for falsely and corruptly certifying as a witness, to more travel and attendance than there had really been. *Kennedy v. Wright*, xxxiv. 351.

7. Such certificate is presumed to be true, till disproved, when it is presumed to have been made corruptly. *Kennedy v. Wright*, xxxiv. 351.

8. It is for the jury to assess the damages under this statute. *Kennedy v. Wright*, xxxiv. 351.

9. To justify one in certifying his travel and attendance as a witness, he must have been in actual attendance at the court house. Though not constantly in the house, he must be within call, at his peril. *Kennedy v. Wright*, xxxiv. 351.

## PENOBSCOT RIVER.

See COLONIAL ORDINANCE.

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## PENSION.

1. By the Act of Congress of June 19, 1842, the children of a widow, to whom, at the time of her death, any amount of pension was due from the United States, are entitled to their equal portion thereof, free from all claims by the creditors or legal representatives of their mother. *Shirley v. Walker*, xxxi. 541.

2. The administrator of the mother, receives such pension merely in trust for her children. *Shirley v. Walker*, xxxi. 541.

3. Where such administrator, (prior to the Act of 1844,) has received such pension money, in trust for a *feme covert*, an action against him to recover the same, may be brought jointly by her husband and herself. *Shirley v. Walker*, xxxi. 541.

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## PERJURY.

1. In an indictment for perjury, the falsity of the testimony, given by the accused, cannot be proved, except by something more than the testimony of one witness. *Newbit v. Statuck*, xxxv. 315.

2. It is not enough to aver in an indictment for perjury, that the perjury was committed in a proceeding in a Court of justice. *State v. Hanson*, xxxix. 337.

3. Where the perjury is predicated upon answers made by the respondent to certain interrogatories, propounded to him on a writ of *scire facias*, it will be invalid, unless the indictment alleges the entry or pendency of such writ in court. *State v. Hanson*, xxxix. 337.

4. Designating the term of the court, at which the offence charged occurred, is not a sufficient averment of the time required to be stated. *State v. Hanson*, xxxix. 337.

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## PERSONAL PROPERTY.

1. By the Act of February 11, 1789, § 3, all lands levied on by an administrator, were held to the sole use and behoof of the widow and heirs of the deceased, and could only be distributed by the Judge of Probate as personal estate. *Furlong v. Soule*, xxxix. 122.

2. A dwellinghouse, erected on the land of another, with the previous knowledge and consent of the owner of the land, remains the personal property of the builder. *Fuller v. Tabor*, xxxix. 519.

3. And if so erected without such knowledge and consent, the owner's subsequent assent that it may remain, will make it equally personal property. *Fuller v. Tabor*, xxxix. 519.

4. If, under a parol agreement to purchase land, one goes on and erects a dwellinghouse, but leaves it unfinished and not underpinned, such house is personal estate. *Pullen v. Bell*, xl. 314.

## PLANTATION.

1. The Act of 1850, c. 196, § 1, authorized assessors of plantations organized for election purposes, and comprised within the limits of a single township or half a township, to prosecute, "in the name of the plantation," for trespass upon the public reserved lots. *Plantation v. Hutchinson*, xxxvi. 374.

2. But, in case of a plantation, comprised of more than a whole township of territory, that Act gave no rights of action either to the plantation, or to its assessors. *Plantation v. Hutchinson*, xxxvi. 374.

3. When a plantation claims to support an action as a corporation duly organized under the Act in relation to elections, they must show a compliance with the provisions of the Act. *Plantation v. Bean*, xl. 218.

4. Without a return by the assessors, to the office of Secretary of State, of certain and definite limits of the plantation, the organization is defective and of no validity. *Plantation v. Bean*, xl. 218.

See AGENCY, 3.

## PLEADING.

- I. PARTIES.
- II. DECLARATION.
- III. RESULTS OF PLEADINGS.
- IV. GENERAL REQUISITES OF PLEADINGS.
- V. SPECIAL PLEADING GENERALLY.
- VI. PLEADING DOUBLE.
- VII. DEFECTS IN PLEADING, WHEN CURED.
- VIII. ADMISSIONS BY PLEADING.
- IX. BRIEF STATEMENTS, COUNTER BRIEF STATEMENTS, AND SPECIFICATIONS OF DEFENCE.

*For Pleading in particular subjects, See APPROPRIATE TITLES.*

## I. PARTIES.

- (a) GENERALLY.
- (b) JOINDER OF PLAINTIFFS.
- (c) JOINDER OF DEFENDANTS.

(a) *Generally.*

1. In an action of tort, wherein the defendants are described, and the wrongful act is alleged to have been done by them, as partners, and they severally plead the general issue, the allegation of partnership is immaterial. *Head v. Goodwin*, xxxvii. 181.

(b) *Joinder of plaintiffs.*

2. A person, who has assigned all his interest in a contract made to him, need not join with the assignee as a plaintiff, in a bill of performance. *Milner v. Whittier*, xxxii. 203.

3. For an injury done to a wife through a defect in the highway, the husband and wife *must* join in the suit. *Starbird v. Frankfort*, xxxv. 89.

4. To maintain assumpsit against one, who, after the loss of a vessel at sea, has received the insurance money upon her freight, all the part owners must join, as co-plaintiffs. *White v. Curtis*, xxxv. 534.

5. Advantage of a non-joinder may be taken on the general issue. *White v. Curtis*, xxxv. 534. *Jones v. Lowell*, xxxv. 538.

6. In trespass, the exception is only available by plea in abatement. *Jones v. Lowell*, xxxv. 538.

(c) *Joinder of defendants.*

7. The non-joinder of a co-promisor can be taken advantage of only by plea in abatement. *White v. Cushing*, xxx. 267.

8. After pleading the general issue, no objection can be taken by the defendant, to the non-joinder of his joint co-promisor. *Reed v. Wilson*, xxxix. 585.

## II. DECLARATION.

- (a) GENERAL RULES.
- (b) DECLARATIONS IN PARTICULAR ACTIONS.
- (c) VARIANCE.
- (d) JOINDER OF COUNTS.
- (e) WRONG VENUE.

(a) *General rules.*

9. The second count in a writ need not allege, that it is for a cause of action "other" than that of the first count. *Ware v. Webb*, xxxii. 41.

10. It is not a rule of law, that all the points, which may be raised by the pleadings in a case, are necessarily involved in the decision. *Dunlap v. Glidden*, xxxiv. 517.

11. A general demurrer to a declaration containing several counts, is unsustainable, if any of the counts are good. *Blanchard v. Hoxie*, xxxiv. 376.

(b) *Declarations in particular actions.*

12. In an action upon a promissory note, payable at a particular time and place, it is not necessary to aver or prove its presentment then and there. If the maker was there, prepared to pay it, that is a matter of defence to be pleaded and proved. *Lyon v. Williamson*, xxvii. 149.

13. And, although the maker was then and there prepared to pay the note, and the holder was not there to receive it, yet, if he subsequently demand payment there, and cannot obtain it, he may maintain an action for it. *Lyon v. Williamson*, xxvii. 149.

14. A declaration charging trespass upon the plaintiff's close is bad, on general demurrer, if it do not describe the close or allege the venue. *Moody v. Hinckley*, xxxiv. 200.

15. In a declaration upon the covenants of seizin and of right to sell, in a deed, the breaches are sufficiently set forth by negating the words of the covenant. *Blanchard v. Hoxie*, xxxiv. 376.

16. But, in a declaration upon the covenants of freedom from incumbrances, and for quiet enjoyment, the breaches must be specially set forth. *Blanchard v. Hoxie*, xxxiv. 376.

17. In a count for covenant broken, alleging several breaches, there may be a recovery for such breaches as are well assigned, although others may be fatally defective. *Blanchard v. Hoxie*, xxxiv. 376.

18. A declaration negating the words of the covenant of seizin, is not defeasible on general demurrer, although it proceed to allege, that the defendant's seizin did not extend to a described part of the land. *Blanchard v. Hoxie*, xxxiv. 376.

19. In an action for services rendered, no damages can be recovered for the violation of a contract. *Lufkin v. Patterson*, xxxviii. 282.

20. When the new promise is made or arises, after the right to maintain a suit upon the original cause of action has been entirely extinguished, or when the new promise varies from the original, there should be a count upon the new promise. In other cases, the declaration may be upon the original note. *Howe v. Saunders*, xxxviii. 350.

21. In an action for abuse of legal process, it is not necessary to aver or prove, that the process is at an end, or that it was sued out maliciously, or without probable cause. *Page v. Cushing*, xxxviii. 523.

22. In dower, unless the declaration alleges a seizin of the husband of an estate of which by law, his widow is dowable, it is defective and insufficient. *Freeman v. Freeman*, xxxix. 426.

23. So it must also show, that the demand for dower was of the one then seized of the freehold, if within the State, otherwise of the tenant in possession. *Freeman v. Freeman*, xxxix. 426.

24. In writs founded upon R. S. of 1841, c. 148, § 49, all the material elements necessary to give the plaintiff a right of action, must be affirmatively and distinctly alleged. And, unless the defendant is charged with knowingly aiding and assisting the debtor in the fraudulent concealment or transfer of property, liable to seizure by attachment or levy, the declaration is insufficient. *Herrick v. Osborne*, xxxix. 231.

(c) *Variance.*

25. A declaration upon a contract for a specified quantity of an article, though laid under a *videlicet*, is not sustained by proof of a contract for a larger quantity. *Foster v. Pennington*, xxxii. 178.

26. Upon a count on a note, not alleged to be on interest, a note drawing interest, though agreeing in all other respects with the count, cannot be read in evidence. *Gragg v. Frye*, xxxii. 283.

27. Such a count, in a suit previously commenced, and yet pending, cannot be pleaded in abatement, in an action upon a note drawing interest, as being for the same cause of action. *Gragg v. Frye*, xxxii. 283.

(d) *Joinder of counts.*

28. It is no valid objection to a declaration, that it contains one count in case and another of trespass *de bonis asportatis*. *Moulton v. Smith*, xxxii. 406.

29. It is only in the form of declaring, and not in any matter of substance, that R. S., of 1841, c. 115, § 13, has abolished the distinction between trespass and case. *Sawyer v. Goodwin*, xxxiv. 419.

30. An allegation of breaking and entering into land, is of substance; and a count, containing no such allegation, but framed technically in case, for injuries done to land, or in trespass *de bonis*, for goods taken from it, cannot be sustained by an unlawful entry. *Sawyer v. Goodwin*, xxxiv. 419.

31. Nor can a declaration in trespass *quare clausum*, alleging immediate acts of injury to land, be sustained by merely proving an injury consequentially resulting from acts done upon the land. *Sawyer v. Goodwin*, xxxiv. 419.

32. To such a declaration, an amendment, introducing a count framed as in case, alleging the damages to have been consequential, is not allowable. *Sawyer v. Goodwin*, xxxiv. 419.

33. It is not objectionable, that the plaintiff has claimed more in his declaration than he has proved, or more than he could rightfully demand; or that he has presented his claim on different grounds in different counts. *Cole v. Sprowl*, xxxv. 161.

(e) *Wrong venue.*

34. In local actions, if the venue be in the wrong county, and it appear on the record, advantage should be taken by demurrer. After pleading to the merits, and after verdict, the objection comes too late. *Heath v. Whidden*, xxix. 108.

## III. RESULTS OF PLEADINGS.

35. Defendants, having pleaded the general issue, have a right to a trial thereon; and special pleas in justification are not a waiver of that right. *Nye v. Spencer*, xli. 272.

36. Every plea must stand or fall by itself; and the language of one plea cannot be taken advantage of to support or vitiate another. *Nye v. Spencer*, xli. 272.

37. After an issue of law is raised upon a demurrer to a plea in bar, the case comes properly before the law court for its determination of that question; and if decided in favor of the plaintiff, the case goes back for trial upon the issue of fact. *Nye v. Spencer*, **XLI.** 272.

38. When, in compliance with the Act of 1852, c. 246, § 8, the judgment rendered in the law court is certified to the clerk of the county where the action is pending, its effect is limited to the question presented. *Nye v. Spencer*, **XLI.** 272.

#### IV. GENERAL REQUISITES OF PLEADINGS.

- (a) CERTAINTY AND PARTICULARITY.
- (b) MATERIALITY.
- (c) FORMING AN ISSUE, AND CONCLUSION OF PLEAS.
- (d) VARIANCE.

##### (a) *Certainty and particularity.*

39. When the defence to a note, is a readiness of the defendant to pay it according to its tenor, the plea must state, that he was ready to pay the money at the time and place named; that he has ever since been ready there to pay the same; and that he brings the money into Court for the plaintiff. *Lyon v. Williamson*, **XXVII.** 149.

40. Where a plea in bar to the further maintenance of the suit, sets forth a conveyance by demandant of the premises, by a deed duly executed, acknowledged and recorded, it is sufficient, though it does not allege that the deed was delivered. *Rowell v. Hayden*, **XL.** 582.

See **BANKRUPTCY**, 22.

##### (b) *Materiality.*

41. To an action on promises, a special plea in bankruptcy is bad on general demurrer, if it do not allege that the debt sued was not of the classes excepted in the first section of the bankrupt law. *Frost v. Tibbetts*, **XXX.** 188.

42. If a replication to a special plea in bar, which presents new matter, should conclude with tendering an issue, and the issue is joined, its materiality is then to be determined. *Frohock v. Pattee*, **XXXVIII.** 103.

##### (c) *Forming an issue and conclusion of pleas.*

43. If the parties put in issue a matter, which is incapable of being legally made so, the Court may direct the pleadings respecting it to be struck out or disregarded. *Ham v. Ham*, **XXXVII.** 261.

44. A replication to a special plea in bar, which presents new matter, should conclude with a verification. *Frohock v. Pattee*, **XXXVIII.** 103. *Wilton Manuf'g Co. v. Woodman*, **XXXII.** 185.

45. In dower, the plea *ne unques accouple*, should conclude with a verification; but, if it should conclude by tendering an issue to the country, though bad on demurrer, still, if the declaration be bad also, judgment must be against the party committing the first fault in pleading. *Freeman v. Freeman*, **XXXIX.** 426.



(d) *Variance.*

46. A reference, made by a party in pleading, to documents concerning a point not in controversy, will not invalidate his proceedings, although such documents contain representations at variance with the allegations of the party making the reference. *Hobbs v. Parker*, xxxi. 143.

47. In such case, he may show the documents to be erroneous. *Hobbs v. Parker*, xxxi. 143.

## V. SPECIAL PLEADING GENERALLY.

48. In a suit in error, a plea of accord and satisfaction is not appropriate. But a release of errors is a perfect defence. *Wilton Manuf'g Co. v. Woodman*, xxxii. 185.

49. In a complaint, charging a misdemeanor, the defendant is not precluded from traversing any material allegation, though made under a *videlicet*. *State v. Phinney*, xxxii. 439.

50. A former conviction for the same offence, cannot avail in arrest of judgment. It should be specially pleaded. *State v. Barnes*, xxxii. 530.

51. A general demurrer to a declaration containing several counts, is unsustainable, if any of the counts are good. *Blanchard v. Hoxie*, xxxiv. 376.

52. Matters in defence, arising after the commencement of the suit, and before issue joined, cannot be pleaded in bar generally, but may be as to the further maintenance of the suit. *Rowell v. Hayden*, xl. 582.

53. If the demandant in a real action, after the commencement of his suit conveys the demanded premises to a third person, the tenant may successfully interpose a plea in bar to the further maintenance of the suit. *Rowell v. Hayden*, xl. 582.

54. Objection to the time of filing a plea *puis darrein continuance*, cannot be made upon demurrer, but through a motion to set aside the plea. *Rowell v. Hayden*, xl. 582.

55. Whether the payment of a debt, after it has been put in suit, must be specially pleaded in bar to its further maintenance, *quere*. *Fisk v. Holmes*, xli. 441.

## VI. PLEADING DOUBLE.

56. Double pleading is at the discretion of the Court, and will be allowed only when there is reasonable ground for believing it will be for the furtherance of justice. *Wilton Manuf'g Co. v. Woodman*, xxxii. 185.

## VII. DEFECTS IN PLEADING, WHEN CURED.

57. After pleading in bar to an action, advantage of the non-joinder of a co-promisor, cannot be taken advantage of. *White v. Cushing*, xxx. 267.

58. So of an insufficient service of the writ, a general appearance and continuance waives the objection. *Shaw v. Usher*, xli. 102.

## VIII. ADMISSIONS, BY PLEADING.

59. When errors of fact are assigned for the reversal of a judgment, a plea of "*in nullo est erratum*," admits the truth of the facts assigned. *Smith v. Rhodes*, xxix. 360.

60. In a suit brought in the name of a corporation, the plea of general issue admits the existence of the corporation. *Put. F. School v. Fisher*, xxx. 523. *O. & L. R. R. Co. v. Veazie*, xxxix. 571. *P. & K. R. R. Co. v. Dunn*, xxxix. 587.

61. In an action, by one who sues as administrator, the general issue or plea in bar admits him to be an administrator. *Clark v. Pishon*, xxxi. 503.

62. In such an action, the general issue may be rejected, if it purport to reserve to the defendant a right of denying that the plaintiff is administrator. *Clark v. Pishon*, xxxi. 503.

63. The demurring to a bad plea does not have the effect of admitting as true the facts therein alleged, to be used in the trial of other issues. *Stinson v. Gardiner*, xxxiii. 94.

64. The pleading of the general issue admits the competency of the defendants to be sued by the name given them in the writ. *Moran v. P. S. & P. R. R. Co.*, xxxv. 55. *O. & L. R. R. Co. v. Veazie*, xxxix. 571.

65. So is the corporate character of a plaintiff proprietary admitted by pleading the general issue. *Roxbury v. Huston*, xxxvii. 42.

66. So is the disseizin by the tenant admitted, by pleading the general issue only to a writ of entry, and under it the tenant cannot prove a personal title in a third person, superior to the demandant's. *Warren v. Miller*, xxxviii. 108.

67. The plea of general issue admits the defendant corporation's capability of being sued where the action was commenced. *Freeman v. M. W. P. & M. Co.*, xxxviii. 343.

68. It does not admit that a plaintiff corporation has performed conditions by which contracts made with it have become binding. *Freeman v. M. W. P. & M. Co.*, xxxviii. 343. *O. & L. R. R. Co. v. Veazie*, xxxix. 571. *P. & K. R. R. Co. v. Dunn*, xxxix. 587.

## IX. BRIEF STATEMENTS, COUNTER BRIEF STATEMENTS AND SPECIFICATIONS OF DEFENCE.

69. A plaintiff is under no necessity of filing a counter brief statement, unless ordered by the Court. *Pratt v. Knight*, xxix. 471.

70. Brief statements cannot prevent the admission of testimony, pertinent under the general issue. *Trask v. Patterson*, xxix. 499.

71. The omission, in a counter brief statement, to deny any allegation of the brief statement, cannot destroy or control the effect of testimony properly received under the former. *Trask v. Patterson*, xxix. 499.

72. To an action of dower, non-tenure cannot be proved under a brief statement; it must be pleaded in abatement. *Manning v. Laboree*, xxxiii. 343.

73. A counter brief statement made by the plaintiff's counsel and read to the Court during the trial, but which was not signed by the plaintiff or his

counsel, forms no part of the proceedings, and may be withdrawn. *Blaisdell v. Roberts*, xxxvii. 239.

74. Under R. S. of 1841, brief statements of matters of defence, aside from such as would come under the general issue, must be certain to a common intent, as much as if stated in a special plea. *Day v. Frye*, xli. 326.

75. A notice of special matter to be given in evidence, in defence, under the general issue, must contain as distinct an allegation of the grounds of defence as would be required in a special plea, though not set forth with the same technicality. *Day v. Frye*, xli. 326.

76. But the rules of special pleading can rarely be applied to brief statements and counter brief statements. The object of allowing these was to obviate that exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits. *Day v. Frye*, xli. 326.

77. In specifications of defence, under the Act of 1855, c. 174, § 4, it is not sufficient for the defendant to aver, generally, that the plaintiff has no claim whatever against him. *Hart v. Hardy*, xlii. 196.

78. The specifications must be more than a plea of the general issue, and sufficient to apprise the plaintiff of the obstacles that would be presented to the maintenance of his suit. *Hart v. Hardy*, xlii. 196.

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## POOR DEBTOR.

- I. ARREST ON MESNE PROCESS.
- II. PROCEEDINGS IN OBTAINING DISCHARGE.
- III. BONDS.
- IV. FALSE DISCLOSURE.

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### I. ARREST ON MESNE PROCESS.

See ARREST.

### II. PROCEEDINGS IN OBTAINING DISCHARGE.

- (a) APPLICATION AND NOTICE TO CREDITORS.
- (b) JUSTICES, AND THEIR SELECTION.
- (c) EXAMINATION AND PROCEEDINGS.
- (d) APPRAISAL AND ASSIGNMENT OF PROPERTY DISCLOSED.
- (e) RECORD AND CERTIFICATE OF DISCHARGE, AND ITS EFFECT.

#### (a) *Application and notice to creditors.*

1. The adjudication of a tribunal duly organized, for taking the disclosure of a poor debtor, upon the legality of the notice given to the creditor, is conclusive. *Baker v. Holmes*, xxviii. 153. *Lowe v. Dore*, xxxii. 27. *Neal v. Paine*, xxxv. 158. *Waterhouse v. Cousins*, xl. 333. *Pike v. Herri-man*, xxxix. 52.

2. The citation need not mention the date of the judgment, or date of the execution. *Rand v. Tobie*, xxxii. 450.

3. Where the citation is directed to the creditor *individually*, and not as *administrator*, but his representative character sufficiently appears in the application which is annexed to and referred to in the citation, it is sufficient. *Rand v. Tobie*, xxxii. 450.

4. The application must be made in writing and signed by the debtor before being served. *Neal v. Paine*, xxxv. 158.

(b) *Justices, and their selection.*

5. It was the duty of the creditor selecting a justice, under R. S. of 1841, c. 148, § 46, as well as under the Act of 1848, c. 85, § 1, to procure the attendance of the justice, selected by him, at the time and place appointed in the citation for the disclosure. *Stanley v. Reed*, xxviii. 458.

6. Where "there were two citations by the same debtors to the same creditor on different bonds made at the same time and returnable at the same time;" and the minutes of the justices state that the plaintiff's attorney appointed "one of the justices to act on each citation;" and where each citation contained a notice to the creditor, that all the debtors were to disclose at the same time;—*Held*, that such justice was authorized to act upon all the cases named in it, and to do every thing respecting it, which the law required. *Chamberlain v. Sands*, xxvii. 458.

7. Under R. S. of 1841, c. 148, the debtor may select one of the justices, at any time after the citation has been prepared and before the tribunal has been organized. *Chamberlain v. Sands*, xxvii. 458.

8. If the record shows that two justices, duly selected, "are unable to agree as to the sufficiency of the notice," and "do not agree upon the selection of the third justice," and thereupon an officer makes the selection; this is sufficient to justify such third selection. *Moody v. Clark*, xxvii. 551.

9. When the third justice has been legally called in to act by reason of the disagreement of the others, he should act until the final decision is made. *Moody v. Clark*, xxvii. 551.

10. If a person, who is a constable, appoint one of the justices, the proceedings will be invalid, unless it be shown that he made the appointment as constable. And this is provable by parol. *Gillighan v. Spiller*, xxix. 107.

11. Under the statute of 1844, c. 88, an appointment of a justice may be made by a constable of the town in which the disclosure is to be made, and in which the debtor is present, although neither of the parties reside there, and although the execution be not directed to a constable, if the damages therein recovered are less than \$100. *Worthen v. Hanson*, xxx. 101.

12. A person, who is uncle to both creditor and debtor, is disqualified from acting as a magistrate in a poor debtor's disclosure, except by consent. *Bard v. Wood*, xxx. 155.

13. So is a person who is father to one of the parties. *Baker v. Carleton*, xxxii. 335.

14. The debtor, whose residence was in one of two adjoining towns, having been arrested upon an execution, by a constable of the same town:—*Held*, that the appointment of a justice resident in the adjoining town might be made by a constable of that town, although the disclosure was to be had in the first. *Daggett v. Bakeman*, xxxiii. 382.

15. A surety upon a poor debtor's bond is incompetent to hear the disclosure as one of the justices. *Winsor v. Clark*, xxxvi. 110.

(c) *Examination and proceedings.*

16. If the debtor discloses a note against another, and adds,—"it is of little or no value, and I hereby offer to assign the same to the creditor, if he deems it to be of any value," the creditor is under no obligation to accept it. The debtor is not made the judge of its value; others are to be selected under the statute. *Call v. Barker*, xxvii. 97.

17. If the justices adjudged property disclosed not subject to the creditor's lien; or omitted to do that which was required in order to make it available to the creditor, when, by the disclosure, it was clearly liable to be taken on execution, such adjudication is not conclusive, but is subject to revision in a suit upon the bond. *Butman v. Holbrook*, xxvii. 419. *Jewett v. Rines*, xxxix. 9.

18. If there be no agreement between the creditor and debtor to have the value of demands disclosed applied in discharge of the debt, the demand should be disposed of according to the 148th chapter of R. S. of 1841, § 29. *Call v. Barker*, xxvii. 97.

19. If the creditor, or his attorney, does not lead the debtor or the justices into an illegal course of proceeding, but merely sits in silence, the rights of the creditor cannot be considered as waived or forfeited. *Call v. Barker*, xxvii. 97.

20. The justices are not authorized, by c. 148, § 31, to make out a certificate of discharge, until the property disclosed by the debtor, being choses in action, has been disposed of or secured according to the statute. And if the oath be administered without such disposal, it can furnish no defence. *Call v. Barker*, xxvii. 97. *Wingate v. Leeman*, xxvii. 174.

21. Justices appointed to hear a disclosure under R. S. of 1841, c. 148, have no authority to act as appraisers of the property disclosed. *Wingate v. Leeman*, xxvii. 174.

22. Where the justices had been duly selected by the parties, and were at the place designated, "within the time mentioned in the citation;" and one of three debtors was also there, and the creditor's attorney, the justices have jurisdiction, and may adjourn to a different hour of the same day, and take the disclosures and administer the oath to all the debtors. *Chamberlain v. Sands*, xxvii. 458.

23. Although two of the debtors did not personally appear until the adjournment, that fact did not take from the justices their jurisdiction, nor authorize the creditor's attorney to withdraw the authority vested in one of the justices by his appointment. *Chamberlain v. Sands*, xxvii. 458.

24. The provisions of § 27, c. 148 of R. S. of 1841, are merely directory, and a compliance with them need not appear of record. *Clement v. Wyman*, xxxi. 50.

25. The provisions of section 29, requiring property disclosed to be "set off," is required, only when the debtor discloses more than enough to satisfy the creditor. *Clement v. Wyman*, xxxi. 50.

26. Sect. 33, requiring the justices to give a certificate of the real estate disclosed, applies only when there is some person present, at the hearing, authorized to receive it, or application is subsequently made for it. *Clement v. Wyman*, xxxi. 50.

27. In a disclosure, no inquiries as to his property or his disposition of it, prior to the contraction of the debt on which he is disclosing, are pertinent or allowable. *Ledden v. Hanson*, xxxix. 355.

28. Whether the facts stated in the disclosure are true, or consistent with the oath, are matters entirely within the jurisdiction of the magistrates, and cannot be revised by this Court. *Ledden v. Hanson*, xxxix. 355.

29. There is no limit, during the examination, beyond which the creditor cannot proceed to reduce to writing the interrogatories and answers, where no objection is interposed, but the request is granted. *Jewett v. Rines*, xxxix. 9.

30. The proceedings of magistrates in taking a disclosure may become invalid on account of fraud; but evidence that they knew that the judgment creditor was dead is not sufficient to show that they acted fraudulently. *Waterhouse v. Cousins*, xl. 333.

(d) *Appraisal and assignment of property disclosed.*

31. The term "accounts," in § 29 of c. 148 of R. S. of 1841, means such claims as the debtor might have against other persons which were the proper subjects of charge as book debts, and for the payment of which no written contract or security had been taken; and the terms "notes, bonds or other contracts," include all other securities and evidences of debts due. *Robinson v. Barker*, xxviii. 310.

32. That could not properly be denominated an account, upon which nothing was due. *Robinson v. Barker*, xxviii. 310.

33. When the debtor discloses accounts or claims to a considerable amount, and states that they have not been settled; that he does not know their amount, or the amount of the counter claims; but that he thinks there is nothing due to him; he must have them appraised according to the statute. *Robinson v. Barker*, xxviii. 310. *Fessenden v. Chesley*, xxix. 368. *Bachelder v. Sanborn*, xxxiv. 230. *Patten v. Kelley*, xxxviii. 215.

34. The assignment, provided for in § 29 of c. 148, must not be qualified by conditions not required by the statute. *Patten v. Kelley*, xxxviii. 215.

(e) *Record and certificate of discharge, and its effect.*

35. The certificate of justices in a disclosure of a poor debtor, that he "caused the creditor to be notified according to law," is conclusive. *Baker v. Holmes*, xxvii. 153.

36. The discharge will not be defeated by a mistake, honestly made, in the quantity of one of the items of property disclosed, provided he delivers all there was of it for the benefit of the creditor. *Collins v. Lambert*, xxx. 185.

37. A certificate of the justices, that they had seasonably administered the poor debtor's oath, specifying the mode of their appointments and proceedings, and showing that the same were in compliance with the statutes, unless invalidated, is a bar to an action upon the relief bond. *Ayer v. Fowler*, xxx. 347.

38. A certificate of the oath administered to a poor debtor by two justices of the peace and quorum, stating that the service of the citation was made upon the attorney of record of the creditors, is not invalidated by another statement therein, reciting that A. B. was one of the creditors, when in fact he was not. And such certificate is conclusive, unless its effect be destroyed by an agreed statement of facts, or by a voluntary admission of testimony which might have been excluded. *Clement v. Wyman*, xxxi. 50.

39. A certificate of discharge is not good, unless it specify the date of the

execution and the amount of the judgment on which it was issued. *Hathaway v. Stone*, xxxiii. 500.

40. Neither is the record of the proceedings of the justices sufficient proof of the performance of the conditions of a relief bond, unless it specify the same facts. *Hathaway v. Stone*, xxxiii. 500.

41. A certificate of discharge furnishes *prima facie* evidence that the justices were duly selected and qualified to act in granting the certificate. *Bachelor v. Sanborn*, xxxiv. 230.

42. The record of the justices, as to hearing the disclosure of, and administering the oath to a poor debtor, is not affected by the granting merely of a writ of *certiorari* to bring it before the Court. *Clark v. Metcalf*, xxxviii. 122.

43. A certificate of two justices, that a poor debtor made a disclosure and they administered to him the oath required, on a day named, and that such hearing before them was in pursuance of a previous adjournment, without certifying any time from which such adjournment was had, is invalid. *Bowker v. Porter*, xxxix. 504.

### III. BONDS.

- (a) FORM, AND TO WHOM GIVEN.
- (b) WHEN GOOD AT COMMON LAW.
- (c) ON MESNE PROCESS.
- (d) FOR DISCLOSURE ON EXECUTION.
- (e) WHEN THE CONDITION IS BROKEN, AND WHEN NOT.
- (f) DAMAGES.

#### (a) *Form, and to whom given.*

44. If a poor debtor's bond be conditioned that he will "deliver himself and go into close confinement," instead of that he "will deliver himself into the custody of the keeper of the jail," &c., it is nevertheless a statute bond. *Hatch v. Lawrence*, xxix. 480.

45. If the officer include dollarage in the penal sum of a relief bond, under a belief that it is allowable, the bond is protected as a statute bond under R. S. of 1841, c. 148, § 43. *Lambard v. Rogers*, xxxi. 350.

46. A "fifteen days" bond may be given for a release from arrest, whether the action be in tort or assumpsit. *Richards v. Morse*, xxxvi. 240.

47. It is not a joint relief bond, given by all the execution debtors, as principals, but it is a separate bond given by each, which, under the statute, entitles to a release from arrest. *Hatch v. Norris*, xxxvi. 419.

48. A bond, given to obtain release from an arrest, made by the collector of taxes, must run to the assessors of the town and not to the inhabitants. *Athens v. Ware*, xxxix. 345.

#### (b) *When good at common law.*

49. A joint relief bond, given by all the execution debtors, is valid at common law. *Hatch v. Norris*, xxxvi. 419.

50. So is a relief bond, given subsequently to the Acts of 1835, c. 195, and of 1836, c. 250, in which the interest due upon the debt formed no part of the penal sum of the bond. *Clark v. Metcalf*, xxxviii. 122.

51. In fulfilling the conditions of such a bond, the debtor is to perform no other statute provisions in relation to poor debtors, than are recited in the bond. *Clark v. Metcalf*, xxxviii. 122.

52. Evidence that, on such bond, the debtor disclosed notes of hand which were not appraised, is not a breach of its conditions, and is inadmissible. *Clark v. Metcalf*, xxxviii. 122.

53. A bond, given to obtain release from an arrest made by the collector of taxes, running to the inhabitants of a town, is good at common law. *Athens v. Ware*, xxxix. 345.

(c) *On mesne process.*

54. A bond, given to procure a release from an arrest on mesne process, where the affidavit was made before a justice of the peace of another State, is void. *Bramhall v. Seavey*, xxviii. 45.

55. In a suit upon a bond, given to procure a release from arrest upon mesne process, the penal sum may be chancered to the amount of the actual damage. *Sargent v. Pomroy*, xxxiii. 388.

56. In a suit upon such a bond, given by force of an affidavit that the debtor is about to depart and reside beyond the limits of the State, &c., in the absence of fraud, it cannot be avoided by showing that the debtor was not in fact about to depart and reside, &c. *Marston v. Savage*, xxxviii. 128.

(d) *For disclosure on execution.*

57. If a debtor would prevent a forfeiture of a relief bond, he must show, affirmatively, a performance of one of the conditions of his bond. *Gillighan v. Spiller*, xxix. 107.

58. In a suit upon such a bond, parol testimony is inadmissible for the plaintiff, to show that one of the justices was appointed for the creditor, by the officer, before the hour appointed for the disclosure; or to show that the debtor disclosed a note due to him, which was not appraised; or that the debtor had conveyed his property in fraud of his creditors. *Ayer v. Fowler*, xxx. 347.

59. Under the Act of 1848, c. 85, no action can be maintained upon a poor debtor's bond, if the creditor suffered no damage by the breach of it. *Sanborn v. Keazer*, xxx. 457. *Hathaway v. Stone*, xxxiii. 500. *Warren v. Davis*, xlii. 343.

60. Though there was a breach by reason of the irregular organization of the justices' court, yet, if they actually administered the oath, and the breach occasioned no damage, the action must fail. *Sanborn v. Keazer*, xxx. 457.

61. The breach of such a bond is of no damage to the creditor, if the debtor had no attachable property. *Sanborn v. Keazer*, xxx. 457. *Hathaway v. Stone*, xxxiii. 500. *Bailey v. McIntire*, xxxv. 106.

62. The surety in a relief bond is discharged, if, without his consent, the obligee, for a valuable consideration, extend the time of the principal to make his disclosure beyond the six months. *Phillips v. Rounds*, xxxiii. 357.

63. A consent by the principal, at the request of the creditor, to delay the making such disclosure, is a valuable consideration. And such contract made with the creditor's attorney, appointed to act for him at the disclosure, is sufficient. *Phillips v. Rounds*, xxxiii. 357.



64. So is the surety discharged, if the creditor and principal, without the knowledge of the surety, make a contract that the bond shall be discharged, if the principal, at a time beyond six months, shall pay a specified part of the amount due. *Thomas v. Dow*, xxxiii. 390.

65. A bond, given pursuant to the statute, for a release from arrest on execution, is a substitute for the custody of the debtor. *Hobson v. Watson*, xxxiv. 20.

66. The property in the bond belongs to the several owners of the judgment, and any such owner may use the name of the obligee for the collection of it. *Hobson v. Watson*, xxxiv. 20.

67. A judgment upon such a bond operates, to the amount recovered, as a discharge of the original judgment. *Hobson v. Watson*, xxxiv. 20.

68. In a suit brought before a justice of the peace upon a poor debtor's relief bond, the plaintiff cannot recover, if it appear that, subsequent to the breach, he received and indorsed upon the execution all the means of payment which the debtor had when the bond expired. *Bailey v. McIntire*, xxxv. 106.

69. A relief bond, given by an arrested execution debtor, does not operate to discharge the judgment, but is merely a collateral security. *Bates v. Tallman*, xxxv. 274.

70. The discharge of such a bond, upon the payment of a part of the execution, there being no stipulation that such payment of a part should be accepted as a release from the whole, will not bar a suit upon the judgment to recover the balance. *Bates v. Tallman*, xxxv. 274.

71. The discharging of such a bond, under such circumstances, given by the maker of a note, will not defeat a suit against the indorser to recover the unpaid part of the judgment. *Bates v. Tallman*, xxxv. 274.

72. If the obligee, in a poor debtor's bond, release the sureties and discharge the bond, by a writing in his hand, not under seal, a consideration may be proved *aliunde*. And evidence that such obligee said the bond was "settled" or "arranged," imports a valid transaction. *Burrill v. Saunders*, xxxvi. 409.

73. So a waiver of the conditions in such bond by the obligee, before the time appointed for a disclosure, is effectual without a consideration. *Burrill v. Saunders*, xxxvi. 409.

74. Each principal obligor, in a joint bond, is a surety for his co-obligor. *Hatch v. Norris*, xxxvi. 419.

75. After the giving of a relief bond upon an execution, no action can be commenced upon the judgment, before the expiration of the six months. *Rollins v. Richards*, xxxvi. 485.

76. In an action upon a relief bond, the creditor is not restricted to the officer's return on the execution, for proof of a demand and refusal to deliver property disclosed, but may show those facts by parol; or correct any mistake in the officer's return by parol. *Torrey v. Berry*, xxxvi. 589.

(e) *When the condition is broken, and when not.*

77. The disclosure of a note or account, without an appraisal and assignment, there being no agreement between the creditor and debtor, that the same shall be applied in discharge of the debt, is a breach of the bond, although they may be worthless. *Call v. Barker*, xxvii. 97. *Wingate v.*

*Leeman*, xxvii. 174. *Robinson v. Barker*, xxviii. 310. *Fessenden v. Chesley*, xxix. 368. *Remick v. Brown*, xxxii. 458. *Baldwin v. Doe*, xxxvi. 494. *Bray v. Kelley*, xxxviii. 595. *Jewett v. Rines*, xxxix. 9.

78. And where a five dollar bank bill and a dollar in specie were disclosed, and, before the oath was administered, he paid over three dollars to his attorney and three dollars to the justices, as their fees, which were exacted before allowing the oath:—*Held*, that such a disposition of the property on which the creditor had a lien, forfeited the bond. *Butman v. Holbrook*, xxvii. 419. *Jewett v. Rines*, xxxix. 9.

79. So also when the debtor refuses to deliver to the officer holding the execution, within thirty days after disclosure, the property by him disclosed. *Hatch v. Lawrence*, xxix. 480. *Nash v. Babb*, xl. 126.

80. If a debtor paid in advance to the justices, for their fees, a greater sum than they were allowed by law, the bond is forfeited, unless he causes his claim against them for reimbursement to be appraised. *Baldwin v. Doe*, xxxvi. 494.

81. It is no answer, in such case, that the creditor might have recovered the surplus in a suit against the justices as trustees of the debtor. *Baldwin v. Doe*, xxxvi. 494.

82. In fulfilling the conditions of a common law bond, given by a poor debtor, he is to perform no other *statute* provisions in relation to poor debtors, than are recited in the bond. *Clark v. Metcalf*, xxxviii. 122.

83. If there is any omission of acts of the debtor, or of the justices, in the examination and proceedings, essential to the rights of the creditor, so that he fails to be benefited by the property disclosed, upon which he has a lien, a breach of the bond will take place. *Jewett v. Rines*, xxxix. 9.

84. The disclosure must be had before justices of the peace and quorum of that county in which the arrest was made, in order to prevent a forfeiture by disclosure. *Houghton v. Lyford*, xxxix. 267.

85. The condition in a "fifteen days bond" is saved by a notice, within fifteen days after the last day of the term at which judgment is rendered, although there had been an adjournment of the Court, and a special judgment had been entered up prior to such adjournment. *Parsons v. Hathaway*, xl. 132.

86. Where a creditor has done no act to excuse or waive a full compliance with the conditions of a poor debtor's bond, within the six months, and where no act of God, nor of the law, has rendered performance impossible; the debtor must satisfy the justices, within that time, that he is entitled to the benefit of the oath, in order to free himself from that condition of the bond. *Newton v. Newbegin*, xliii. 293.

#### (f) *Damages.*

87. In a suit upon a poor debtor's bond, since the Act of 1842, c. 31, has been in force, if the condition has not been performed, the damages are to be assessed by the Court. *Call v. Barker*, xxvii. 97. *Sargent v. Pomroy*, xxxiii. 388. *Clifford v. Kimball*, xxxix. 413.

88. If the oath be administered without a disposal of property disclosed under R. S. of 1841, c. 148, § 29, it can furnish no defence; and the plaintiff is entitled to have his damages assessed according to the provisions of § 39. *Call v. Barker*, xxvii. 97.

89. Where a law question, in a suit upon a poor debtor's bond, was pending at the time of the Act of August 11, 1848, arising upon an agreed statement of facts, the Court will give an opportunity, if the condition of the bond be forfeited, for the defendant to have the damages estimated by the jury. *Robinson v. Barker*, xxviii. 310.

90. If a breach of the bond be caused by the omission to appraise a note disclosed, damages, under Act of 1848, c. 85, § 2, are not limited to the value of the note; but any legal proof, showing the ability of the debtor to have paid the debt or some part thereof, is admissible. *Call v. Barker*, xxviii. 317.

91. When a debtor, after having duly cited his creditor, shall have taken the poor debtor's oath, although before magistrates not having jurisdiction, the damages are to be assessed according to the Act of 1848, c. 85. *Bard v. Wood*, xxx. 155. *Sanborn v. Keazer*, xxx. 457. *Baker v. Carleton*, xxxii. 335. *Winson v. Clark*, xxxvi. 110. *Hatch v. Norris*, xxxvi. 419. *Houghton v. Lyford*, xxxix. 267.

92. So, where the bond has been forfeited for any irregularity in the proceedings, and the oath has been administered. *Remick v. Brown*, xxxii. 458. *Bachelder v. Sanborn*, xxxiv. 230. *Hatch v. Norris*, xxxvi. 419. *Bray v. Kelley*, xxxviii. 595.

93. Where an execution debtor has mortgaged a chose in action for the security of one of his creditors, and it was not of sufficient value to secure such creditor, an omission to cause the same to be appraised, before taking the poor debtor's oath, will be considered of no actual damage to the creditor. *Remick v. Brown*, xxxii. 458.

94. In chancering a bond, given to procure a release from an arrest upon mesne process, in the absence of proof, the sum due on the execution will be considered the actual damage. *Sargent v. Pomroy*, xxxiii. 388.

95. And that rule will not be varied by proof that the debtor was without attachable property at a period several months later than the breach of the bond. *Sargent v. Pomroy*, xxxiii. 388.

96. Where a "fifteen days" bond was given to procure a release from an arrest in an action of tort, and the condition was broken, the damages will be the amount of the judgment and costs of the action in tort with interest. *Richards v. Morse*, xxxvi. 240.

97. If a breach of a poor debtor's bond in any case is proved, when there has been a disclosure, the damages are not restricted necessarily to the value of the property disclosed, but the creditor is entitled to recover the real and actual damage, upon all the evidence submitted. *Torrey v. Berry*, xxxvi. 589. *Nash v. Babb*, xl. 126.

98. In a suit upon a bond, given under R. S. of 1841, c. 148, § 17, for a breach, and a default is submitted to, the damages are to be assessed by the Court, and not by the jury; and the amount is the actual damage sustained. And no allegation against the fraudulent concealment of his property, whereby he would be prevented from taking the statute oath upon a disclosure, will entitle the obligee to a hearing in damages before the jury. *Clifford v. Kimball*, xxxix. 413.

See Costs, 16.

## IV. FALSE DISCLOSURE.

99. Under the R. S. of 1841, c. 148, § 47, whenever a debtor shall wilfully make a false disclosure, or withhold or suppress the truth, the creditor may commence a special action of the case against him, particularly alleging the false oath, and fraudulent concealment of such debtor's estate, or property, and, on oath, before some justice of the peace, may declare his belief of the truth of the allegations in the writ and declaration; and the justice administering the oath shall certify the same on the writ. The debtor shall *thereupon* be held to bail. *Dyer v. Burnham*, xli. 89.

100. This remedy has its foundation in the statute alone. And the required oath, and certificate thereof by a justice of the peace, are necessary, to make the allegations in the writ and declaration effectual under the statute. Goodenow, J., dissenting. *Dyer v. Burnham*, xli. 89.

## PRACTICE.

## I. APPEARANCE.

## II. AGREED STATEMENT OF FACTS, REPORT AND EXCEPTIONS.

## III. MOTIONS AND PROCEEDINGS IN COURT BEFORE TRIAL.

## IV. TRIAL.

## I. APPEARANCE.

1. Where an action is entered at the proper term, and the defendant appears by his attorney, and enters his appearance upon the docket, the Court cannot take away the defendant's right to costs by ordering a misentry. *Whitney v. Brown*, xxx. 557.

2. The name of an attorney, placed "for special purpose" under the name of a respondent, in the docket entry of petition for partition, does not constitute an "answer" or "appearance." *Larrabee v. Larrabee*, xxxiii. 100.

3. Where the plaintiff's appearance is seasonably called for, the attorney's employment must be shown; but, if not called for at the first term, it will be presumed. *Prentiss v. Kelley*, xli. 436.

## II. AGREED STATEMENT OF FACTS, REPORT AND EXCEPTIONS.

4. To enable the Court to decide an action upon an agreed statement of facts, the statement must have been made in a case legally before the Court for its decision. Parties, by their agreement, cannot present a case to the Court in a manner not authorized by law. *Hatch v. Allen*, xxvii. 85.

5. The report of a case by a Judge of the District Court, under Act of 1845, c. 172, must be drawn up with the consent of the parties thereto; and the facts thus reported are the only ones that can be disclosed to the Court, not excepting the writ and pleadings, unless made a part of the case. *Lyon v. Williamson*, xxvii. 149. *Gardiner v. Piscata. Mut. F. Ins. Co.*, xxxviii. 439.

6. But the stipulations of such reports must be such as to provide that the final disposition of the action shall be dependent upon the decision of the questions of law thus presented. *Randall v. Haines*, xxxi. 418.

7. Hence, a stipulation, that, if the decision of the questions of law be in favor of one of the parties, the other shall have a right to a jury trial, will be dismissed for irregularity. *Randall v. Haines*, xxxi. 418.

8. In a case presented upon a statement of facts, without any stipulation that the decision should be influenced by the pleadings, the defendant is to have judgment, if the facts would verify any plea; and the pleadings need not be examined. *Moore v. Philbrick*, xxxii. 102.

9. An action, originating before a magistrate, cannot be brought into this Court by appeal from the District Court, upon an agreed statement of facts. *English v. Sprague*, xxxii. 243. *Giles v. Vigereaux*, xxxii. 565.

10. The report of a case, from *Nisi Prius*, will be dismissed, though signed by the Judge, if it be found defective in any essential particulars. *Porter v. B. B. R. Co.*, xxxii. 539.

11. In a case submitted to the Court, upon facts agreed, the Court has power to infer other facts, though such power be not expressly given. *Spring v. Davis*, xxxvi. 399.

12. Where exceptions only are taken, the cause must be determined by the points thus presented; and any questions, not thus saved, cannot be considered. *State v. Hinckley*, xxxviii. 21.

13. Where a party relies upon an offer to prove that the cause of action was fraudulently concealed, as an answer to a plea of limitations, such offer, in the report, must clearly appear to have embraced all the requirements of the statute in that particular. The time when the fraudulent concealment was discovered must not be left in doubt. *Thurston v. Lowder*, xl. 197.

### III. MOTIONS AND PROCEEDINGS IN COURT BEFORE TRIAL.

- (a) MOTIONS IN ABATEMENT.
- (b) NOTICE TO PRODUCE PAPERS.
- (c) GENERALLY.

#### (a) *Motions in abatement.*

14. In replevin, after issue joined upon the merits, it is too late to move the dismissal of the action, because no replevin bond was returned. *Wilson v. Nichols*, xxix. 566.

15. A writ may be quashed, upon motion, for an insufficient service; but it must be made within the time allowed for pleading in abatement. *Shorey v. Huzzey*, xxxii. 579. *Nickerson v. Nickerson*, xxxvi. 417.

17. When there is no return day, or an erroneous one, in a writ, the omission or error can be taken advantage of only on plea or motion in abatement. *Pattee v. Lowe*, xxxv. 121.

18. If a defect in mesne process be apparent upon the record, it may be abated on motion. *Chamberlain v. Lake*, xxxvi. 388.

See ABATEMENT.

(b) *Notice to produce papers.*

19. Notice, given to the opposing counsel, to produce a written paper, is ineffectual, if the paper be held by him merely as the counsel of some person unconnected with the action on trial. *Baker v. Pike*, xxxiii. 213.

20. Where a party is duly notified to produce any specified books or papers, and he does so, and they are examined by the party calling for them, who does not introduce them, they may be used as evidence by the party producing them. *Blake v. Russ*, xxxiii. 360.

21. The 35th rule of this Court, requiring notice to produce written evidence in his possession, &c., is dispensed with, by the voluntary offer of the party to produce it. *Dwinell v. Larrabee*, xxxviii. 464.

(c) *Generally.*

22. It is not contemplated, in the constitution or laws, that a party can save the expense of counsel and assistance, go on, as it were, blindfold, and, if he becomes the victim of his own rashness and indiscretion, make them the basis of a claim to be restored to his original condition in the suit, especially where he produces no evidence that he suffered any loss on the merits. *Wood v. Noyes*, xxvii. 230.

23. No precise form of words is necessary in a notice to account, &c. It is enough, if it be such that it cannot mislead the party, or leave him in any doubt of the object of it. *Whittier v. Vaughan*, xxvii. 301.

24. In local actions, if the venue be in the wrong county, and the objection appear on the record, it should be taken advantage of on demurrer. After pleading to the merits, and after verdict, it is too late to raise the objection. *Heath v. Whidden*, xxix. 108.

25. When exceptions have been filed and allowed in the District Court, to any of its preliminary, collateral or interlocutory judgments, directions or opinions, the exceptions must remain among the proceedings of that Court, without being entered in this Court, until the action shall have been prepared, by nonsuit, default or verdict, for its final disposition in that Court. *Daggett v. Chase*, xxix. 356.

26. A trustee disclosed in the District Court, and filed exceptions to its rulings, and entered the exceptions in this Court, before service upon the principal:—*Held*, the exceptions must be dismissed, as prematurely entered. *Wells, J.*, dissenting. *Daggett v. Chase*, xxix. 356.

27. It is not strictly legal for a defendant, in a criminal suit in the District Court, to file exceptions, both to the rulings of the Judge at the trial, and to his rulings upon a motion in arrest of judgment. In such case, this Court will hold the former exceptions to have been withdrawn or waived, and will act only upon the latter. *State v. Wing*, xxxii. 581.

28. In a motion in arrest, it is requisite that the causes for the arrest be specified. *State v. Wing*, xxxii. 581.

29. By filing a motion in the District Court for a new trial after verdict, a party waives the right of excepting to the rulings of the Judge at the trial. *Dinsmore v. Weston*, xxxiii. 256.

30. On the trial of an appeal from a justice of the peace, copies of the record and of all the papers filed in the case, excepting papers used as evidence, are required to be produced by the appellant. *Holden v. Barrows*, xxxix. 135.

31. A motion to set aside the verdict as against evidence, without a full report of the evidence, certified by the Judge presiding at the trial, cannot be considered. *Nutt v. Merrill*, *XL*. 237. *Lakeman v. Pollard*, *XLIII*. 463. *Taylor v. Pierce*, *XLIII*. 530.

#### IV. TRIAL.

- (a) LOSS OF PAPERS.
- (b) RIGHT TO OPEN AND CLOSE.
- (c) DEPOSITIONS.
- (d) EXAMINATION OF WITNESSES.
- (e) MODE OF CONDUCTING TRIALS AND ARGUMENTS.
- (f) ISSUE TO BE TRIED.
- (g) AGREEMENTS OF PARTIES.
- (h) ORDERING A NONSUIT, DEFAULT OR OTHER JUDGMENT.
- (i) POWER OF THE COURT TO DIRECT THE COURSE OF TRIAL.
- (j) INSTRUCTIONS TO THE JURY.
- (k) ASSESSMENT OF DAMAGES.
- (l) RULES OF COURT.
- (m) GENERALLY.

##### (a) *Loss of papers.*

32. A conveyance of land cannot be proved by parol evidence of the contents of a lost paper, unless it be proved that the paper was a deed legally executed. *Dunlap v. Glidden*, *XXXI*. 510.

##### (b) *Right to open and close.*

33. On an appeal from a decree of the Judge of Probate, the right in this court to open and close belongs to the appellant. *Deering v. Adams*, *XXXIV*. 41.

##### (c) *Depositions.*

34. Depositions taken out of the State, by persons duly authorized, may be admitted or rejected, at the discretion of the Court, notwithstanding any irregularity in the taking of them. *Wight v. Stiles*, *XXIX*. 164. *Clark v. Pishon*, *XXXI*. 503. *George v. Nichols*, *XXXII*. 179. *Freeland v. Prince*, *XLI*. 105.

See DEPOSITION.

##### (d) *Examination of witnesses.*

85. In order to discredit an opposing witness, by proving that he had made declarations in conflict with his testimony, it is not requisite that he should be previously interrogated as to such declarations. *Wilkins v. Babershall*, *XXXII*. 184.

36. The objection to the competency of a witness, on the ground of interest, must be taken, if known, before the testimony is given. *Rumsey v. Bragg*, *XXXV*. 116. *Stuart v. Lake*, *XXXIII*. 87.

37. In such case, it is too late to interpose the objection upon a recall of the witness to testify further. *Rumsey v. Bragg*, *XXXV*. 116.

38. A question to a witness, in cross-examination, may be precluded, if its relevancy to the issue be not made known to the Court. *Rumsey v. Bragg*, xxxv. 116.

39. If, during a trial, evidence is admitted against the objections of one of the parties, and, subsequently, the cause is left to the determination of the presiding Judge, such objections must be considered as waived. *Hersey v. Verrill*, xxxix. 271.

40. The party objecting to the competency of a witness is limited to those objections only which were presented at the trial. *Bunker v. Gilmore*, xl. 88.

(e) *Mode of conducting trials and arguments.*

41. Counsel will not be permitted to argue to the jury, that the note before them was payable, according to the agreement of the maker, at a different place than is indicated by the note itself. *Pierce v. Whitney*, xxix. 188.

42. The judge has the right to direct in what stage of the case a party shall introduce his testimony; and to enforce a notice upon him, that if he stop, he will be precluded from afterwards presenting further evidence of a cumulative character. *Dane v. Treat*, xxxv. 198.

43. But, unless such notice be given, he may introduce cumulative evidence in any subsequent stage of the case, though having once stopped. *Dane v. Treat*, xxxv. 198. *Moore v. Holland*, xxxvi. 14.

44. If a person, on trial for an alleged offence, offer no evidence of his good character, it will not authorize counsel to argue to the jury against his general good character. *State v. Upham*, xxxviii. 261.

(f) *Issue to be tried.*

45. If, after a question of law has been presented on report, a motion be made to amend the pleadings, for the purpose of introducing a new matter of defence, it will not be granted, if the proposed defence would not be a valid one. *Hardy v. Nelson*, xxvii. 525.

46. Questions raised by pleading, and issues taken thereupon, followed by a verdict and judgment, cannot be agitated, in another suit between the same parties or their privies, concerning the same subject matter. *Hobbs v. Parker*, xxxi. 143.

(g) *Agreements of parties.*

47. An agreement under seal, to withdraw an action from the court, is not rescindable by one of the parties alone. *Hutchings v. Buck*, xxxii. 277.

48. Where, in pursuance of such an agreement, the entry of "neither party" has been made, the suit is discontinued, and the jurisdiction of the Court at an end. *Hutchings v. Buck*, xxxii. 277.

49. Though the same agreement also contains a submission of the action, and the referee afterwards dies, before having acted upon the matter, still there is no authority in the Court to restore the action. *Hutchings v. Buck*, xxxii. 277.

50. A co-defendant may be cited anew, and proceeded against, although the suit had been previously discontinued as to him, on an agreement for a valuable consideration. *Drake v. Rogers*, xxxii. 524.



51. It is not competent for another defendant to object to such a proceeding. *Drake v. Rogers*, xxxii. 524.

52. A discontinuance does not of itself discharge the debt sued for. *Drake v. Rogers*, xxxii. 524.

53. The Act of 1852, c. 246, § 8, for the disposition of "all the questions of law arising on reports of evidence," has reference only to cases submitted on the evidence, by agreement of the parties, to the decision of the Court, without being passed upon by the jury. *Palmer v. Pinkham*, xxxvii. 252.

(h) *Ordering a nonsuit or default, or other judgment.*

54. In directing a nonsuit, the Court may consider the testimony drawn out in the cross-examination of the plaintiff's witnesses, as well as that presented in chief. *Eastman v. Howard*, xxx. 58.

55. Although exceptions from the District Court may have been sustained, yet, if it appear that there are no facts in the case to be settled by the jury, such final judgment may be entered by this Court as the principles of law require. *Waldo v. Moore*, xxxiii. 511.

56. After evidence has been introduced by both parties, a nonsuit cannot rightfully be ordered, except by consent. *Lyon v. Sibley*, xxxii. 576. *Emerson v. Joy*, xxxiv. 347.

57. Where a plaintiff has examined one of his witnesses solely to prove the execution of papers used on the trial, an examination of him by the defendant on other and distinct matters, immaterial to the issue, will not prevent the Judge from ordering a nonsuit. *Frye v. Gragg*, xxxv. 29.

58. A case marked "law," on the county docket, should be transferred to the next law term; and, if not done so, the Judge afterwards presiding at the county court may enter a nonsuit, default or judgment on the verdict, though it is suggested that the omission occurred through mistake or inadvertence. *Farrin v. K. & P. R. R. Co.*, xxxvi. 34.

See NONSUIT.

(i) *Power of the court to direct the course of trial.*

59. Where the writ alleges the indebtedment of the defendant to be according to the account annexed, and for services performed for defendant, at his request, and the account annexed is "for your proportion of costs and expenses of suit W. v. N.," the plaintiff may recover under that count for the service of the writ. And, although the plaintiff omitted to state such a claim in his opening, it is within the discretionary power of the Court to allow him to claim it, where the writ and return have been used in the trial, even after the evidence is all out, and defendant's counsel is about addressing the jury. *Nutt v. Merrill*, xl. 237.

60. It is not competent for a Judge at *Nisi Prius* to order the evidence to be reported, or to order the parties to agree upon a statement of facts. If the parties cannot agree to raise questions of law, the cause must be heard and determined at *Nisi Prius*, and the party aggrieved may allege his exceptions. *Baker v. Johnson*, xli. 15.

61. It is within the discretion of the presiding Judge to grant delay, on the acceptance of the report of referees. *Smith v. Gorman*, xli. 405.

(j) *Instructions to the jury, and sending them out.*

62. A party has no right to request instructions upon the effect a portion of the evidence introduced should or might have upon the minds of the jurors, when examined separately from the other evidence applicable to the same point. *White v. Jordan*, xxvii. 370.

63. The law having been stated to the jury, they may in all cases judge of the reasonableness of charges made in an account. When there is proof of an agreed price or compensation, or of an usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage. *Codman v. Armstrong*, xxviii. 91.

64. If part of a requested instruction be correct, and a part erroneous, the whole request may be declined. *Thomaston v. Warren*, xxviii. 289. *Atkinson v. Snow*, xxx. 364. *Bryant v. Crosby*, xl. 9.

65. An omission of the presiding Judge to charge the jury in relation to certain principles, not brought to his consideration, and no request being made for such instruction, forms no ground of exception. *Harpwell v. Phipsbury*, xxix. 313. *State v. Knight*, xliii. 11.

66. It is not erroneous for the presiding Judge to instruct the jury upon a supposed case wherein actionable words might be spoken with propriety, and, to prevent misapprehension, remark that the supposed case was not intended to be represented as the one before them. *Taylor v. Robinson*, xxix. 323.

67. Where the presiding Judge instructs the jury appropriately as to the facts, and correctly as to the law, though not in terms as requested, there is no cause for exception. *State v. Barnes*, xxix. 561. *Porter v. Sevey*, xliii. 519.

68. Where the ruling of the Judge is, in itself, correct, it will be sustained, although the reason he gave for it be incorrect. *Prescott v. Hobbs*, xxx. 345.

69. Where evidence was admitted upon condition that the party introducing it would prove another material and connected fact, which he was unable to prove:—*Held*, that the jury should disregard such evidence; and, though they were not expressly instructed so to do, yet, as the proceedings were had in their presence, the Court will presume they did disregard it. *Bangor v. Brunswick*, xxx. 398.

70. In charging the jury, it is within the province of the Judge to arrange and comment upon the evidence, though it may have the appearance of an argument. *Emery v. Estes*, xxxi. 155.

71. Where the jury returns into court without permission, the Judge's direction that they withdraw to their room, is not a sending them out, within the meaning of the statute. *Emery v. Estes*, xxxi. 155.

72. Though one witness testify positively, to a fact, and another of equal credibility contradict it, the jury are not to be instructed, as matter of law, that the fact is not proved. *Johnson v. Whidden*, xxxii. 230. *Sweetser v. Lowell*, xxxiii. 446.

73. The contending by counsel, in argument to the jury, that a certain position is a principle of law, does not of itself require the Judge to instruct the jury upon that point. *Tenney v. Butler*, xxxii. 269. *State v. Straw*, xxxiii. 554. *Bird v. Bird*, xl. 398.

74. In the charge to the jury, the Judge's remark, that, in relation to a position taken by one of the parties, he had not perceived any evidence in

support of that position, but still referring it to the jury to settle the case upon the evidence, is not such an interference, with the province of the jury, as to sustain exceptions. *Cunningham v. Batchelder*, xxxii. 316.

75. A request, by a defendant in a criminal prosecution, that the Court would instruct the jury upon a legal point, relied on in defence, precludes him from objecting to the right of the Court to instruct the jury, though unfavorably to him, upon that point. *State v. Madison*, xxxiii. 267.

76. Whether it is the right of a party, after the jury has once retired with the cause, to request new instructions, *quere*. *Weeks v. Elliott*, xxxiii. 488.

77. A Judge cannot be required to instruct the jury that they may infer any matter of fact involved in the issue, from a selected part of the evidence. *Johnson v. Knowlton*, xxxv. 467.

78. A jury, after having sealed up their verdict and separated, cannot be sent back to reconsider it, except by consent of parties. *True v. Plumley*, xxxvi. 466.

79. When a document is read to a jury for a specific, lawful purpose, which is also evidence of facts not admissible, it is the duty of the Court to instruct them to disregard every other consideration than the one for which it was admitted. *State v. Lull*, xxxvii. 246.

80. Instructions to the jury, when matter of exception in law, may properly be considered in connection with the evidence reported, bearing upon the point on which the instructions were given. *Boobier v. Boobier*, xxxix. 406.

81. A request for an instruction, that has no application to the issue may be refused. *State v. Hall*, xxxix. 107. *Treat v. Lord*, xlii. 552. *Hunnewell v. Hobart*, xlii. 565. *State v. Knight*, xliii. 11.

82. Without proof tending to establish that the sales of liquor were by the importer, or of imported liquors in the original packages, the Judge may withhold instructions as to the law in that contingency. *State v. Robinson*, xxxix. 150.

83. When, to support his claim before the jury, the plaintiff is sworn and produces his book and reads the entry of his charges therein, and testifies that the articles were delivered to the defendant, without objection; the Court are not authorized to instruct the jury that the evidence is insufficient. *Cook v. Brown*, xxxix. 443.

84. A request for instructions, which assumes a ground of defence to the suit which is not taken, may be refused. *Franklin Bank v. Cooper*, xxxix. 542.

85. Thus, a request for an instruction, that defendant is not permitted to avoid his liability by proof that he did not understand the import of the bond, unless he was induced by the plaintiffs or their agents to suppose it was different from what it really was, may be refused, when the defence is, not that he did not know the import of the bond, but that facts material to the risk were concealed from him. *Franklin Bank v. Cooper*, xxxix. 542.

86. Instructions, though true as abstract propositions, which have no foundation in the evidence in the case, but which may have had a tendency to mislead the jury, cannot be sustained. SHEPLEY, C. J., non-concurring. *Hopkins v. Fowler*, xxxix. 568. *Weston v. Higgins*, xl. 102.

87. In instructing the jury as to the necessity under which a sale of a vessel and cargo may be effected by the master, no term to intensify the word "necessity" is necessary. *Prince v. Ocean Ins. Co.*, xl. 481.

88. The maxim "*falsus in uno, falsus in omnibus*" is qualified by circumstances. *Parsons v. Huff*, **XXI.** 410. *Merrill v. Whitefield*, **XXI.** 414.

89. Instructions, asking the consideration of evidence introduced without objection, are no cause for exceptions, though inadmissible. *Brown v. Moran*, **XLII.** 44.

90. A refusal to instruct the jury, that it was not competent for the plaintiff to have recovered, in assumpsit, for the articles declared for in the present suit, (trespass,) is not erroneous, although it might have been proper in the action of assumpsit. *Brown v. Moran*, **XLII.** 44.

91. The report of commissioners described certain estate set off, as "the water privilege now occupied by the saw-mill F. :—*Held*, that an instruction, that, by the partition, the owners of the F. mill had no right to any more water than was necessary to the full enjoyment thereof, with all its machinery, at the time of the partition, was too restricted. *Monroe v. Gates*, **XLII.** 178.

92. Rulings, allowing evidence of damages, sustained by the defendant for a partial non-fulfillment of the contract on the part of the plaintiff, to go to the jury to prevent a recovery, *pro tanto*, on the note, without any limitation as to whether the consideration of the note grew out of that contract, were erroneous. *Hall v. Tribou*, **XLII.** 192.

94. The fact of notice having been admitted, in an action against a town for a defect in a highway, that question should not be submitted to the jury. *Larrabee v. Searsport*, **XLII.** 202.

95. Evidence, tending to show that a certain "stake" is the monument referred to in a deed, is admissible ; but from the facts thus proved, and in the absence of all counter proof, instructions, that there was any presumption of law that it was such monument, are erroneous. *Robinson v. White*, **XLII.** 209.

96. The presiding Judge is not bound to give an instruction in the language of a request nor as a requested instruction. *Anderson v. Bath*, **XLII.** 346. *Treat v. Lord*, **XLII.** 552. *State v. Knight*, **XLIII.** 11.

97. The Judge may properly refuse to give a requested instruction involving no question of law. *State v. Knight*, **XLIII.** 11.

98. An instruction, that if the jury should find, that by the description of the note in a notice to the indorsers, of its dishonor, the indorsers might reasonably be presumed to know it referred to the note in suit, they might find the notice to be sufficient ; is correct. *Waterman v. Vose*, **XLIII.** 504.

See PAUPER, 50.

#### (k) *Assessment of damages.*

99. In a case brought from the District Court by exceptions, this Court cannot authorize the remittitur of any excess of interest allowed by the jury in the verdict. *Greenleaf v. Hill*, **XXX.** 165.

100. In replevin, submitted on questions of law, without any stipulation as to damages, the Court, at another term after judgment of nonsuit and return, has no power to assess the defendant's damages or to submit that question to a jury. *Dillingham v. Smith*, **XXXII.** 182.

101. Where a party seeks to recover payment for articles delivered, under a special contract which he has not fully performed, the damages suffered by reason of such breach may legally be deducted in the same suit. *Rogers v. Humphrey*, **XXXIX.** 382.

See DAMAGES.

(1) *Rules of court.*

102. The Supreme Judicial Court had authority to make and establish the 34th Rule of practice, adopted in 1822, respecting the addition of office copies. *Sellers v. Carpenter*, xxvii. 497.

103. That Rule does not justify the introduction of any papers touching the realty, except deeds. *Dunlap v. Glidden*, xxxi. 510.

104. The 33d Rule is neither repugnant to law, nor against sound policy, and may rightfully be enforced. *Libby v. Cowan*, xxxvi. 264.

105. The 9th Rule, requiring specifications to be filed, &c., in accordance with the Act of 1855, c. 174; that the defence shall in all cases be confined to the grounds therein set forth; and that all the allegations in the writ and declaration, not therein specifically denied, shall be regarded as admitted for the purposes of the trial, is not repugnant to R. S. of 1841, c. 115, § 18, abolishing special pleading, but is in strict harmony therewith and adapted to give it force and effect. *Day v. Frye*, xli. 326.

(m) *Generally.*

106. By a default, the declaration is to be taken as true, and regarded the same as if a verdict had been taken. *Heath v. Whidden*, xxix. 108.

107. After the nonsuit of an action, a second suit, for the same cause, may be stayed by the Court, until the defendant's cost in the former action be paid; notwithstanding the second suit is brought by an assignee, who, when purchasing the demand, had no knowledge that it had previously been put in suit. *Warren v. Homestead*, xxxii. 36.

108. The 7th section of the Act of 1846, for restricting the sale of intoxicating liquors, requires the defendant appellant to "advance the jury fee, and all other fees that may arise after the appeal." By the "other fees," are meant only such fees as arise for the services of the clerk of the Court. *Levant v. Varney*, xxxii. 180.

109. By suffering default, the defendant does not admit the jurisdiction of the Court, nor the correctness of the proceedings in the suit. *Jewell v. Brown*, xxxiii. 250.

110. It is not irregular to refuse a motion for leave to summon in additional joint promisors, while an issue is pending upon a plea in abatement for the non-joinder. *Mahan v. Myers*, xxxiv. 34.

111. Where the parties agree that the case shall be decided upon the declaration and the pleadings, the Court must determine it upon the actual pleadings as they appear in the case. *Gray v. Kimball*, xlii. 299.

112. When an action is properly pending, the Court cannot dismiss it, on motion, because the plaintiff has not tendered a bond of indemnity. *Moore v. Fall*, xlii. 450.

PRESCRIPTION.

1. A right to flow lands for the working of a mill may be acquired by prescription, although the flowing was occasioned by different dams, owned by different persons, and for different purposes. *Davis v. Brigham*, xxix. 391.

2. Prescription rests upon the presumption of a grant which has been lost. *Davis v. Brigham*, **xxix.** 391.

3. The word "exclusive," when used with reference to the acquisition of a prescriptive right, can only mean that the enjoyment of the easement as claimed, whether it be a limited or more general enjoyment, should exclude others, strangers to them and to their claims, from a participation of it. *Davis v. Brigham*, **xxix.** 391.

4. Though a dam may have flowed land more than twenty years, a prescriptive right is not established, unless the occupation was by the one setting it up, or some person under whom he claims. *Benson v. Soule*, **xxxii.** 39.

5. A continued occupation of land for twenty years, personally or by agent, gives title to the occupant, unless such occupation has been in subserviency to another's title. *Goodwin v. Sawyer*, **xxxiii.** 541. *Clancey v. Houdlette*, **xxxix.** 451.

6. A right by prescription to flow land to a given height, by means of a mill-dam, cannot be sustained, unless the flowing had caused damage to the owner. *Wentworth v. Sanford Manuf'g Co.*, **xxxiii.** 547.

7. Whether a prescriptive right to flow land to a given height can be proved, in order to reduce the damage occasioned by the dam when elevated above that height, *quere*. *Wentworth v. Sanford Manuf'g Co.*, **xxxiii.** 547.

8. A non-user of twenty years of a right, acquired by use to maintain a dam, furnishes presumptive evidence of an extinction of the right by abandonment. *Farrar v. Cooper*, **xxxiv.** 394.

9. A servitude is presumed to be extinguished, when the proprietor of the estate, charged with it, is permitted, for a sufficient length of time, to manage it in such manner as to preclude the exercise of the rights arising out of that servitude. *Farrar v. Cooper*, **xxxiv.** 394.

10. The occupation of land twenty years, as a mill-yard for piling logs, timber and boards, is sufficient evidence of title as against one who, subsequently, without title, takes the occupation of it to himself. *Saco W. P. Co. v. Goldthwaite*, **xxxv.** 456.

11. In a writ of entry, adverse possession will not establish title in the tenant, unless commenced twenty years before the suit. In petition for partition it is otherwise. *Saco W. P. Co. v. Goldthwaite*, **xxxv.** 456.

12. No prescriptive rights can be claimed against existing statutes defining the boundaries of towns. *Ham v. Sawyer*, **xxxviii.** 37.

13. One claiming by possession the prescriptive right to abut his mill-dam upon the opposite shore must show such possession adverse and exclusive twenty years prior to the commencement of the action. *Trask v. Ford*, **xxxix.** 437.

14. Merely abutting one's mill-dam upon the opposite shore, without the claim of right, may create an easement after its continuance for twenty years, but will not divest the owner of the shore of his title. *Trask v. Ford*, **xxxix.** 437.

15. Such acts are assumed to be in submission to the title of the owner, unless adverse. *Trask v. Ford*, **xxxix.** 437.

16. The rights of the public, in a navigable river, cannot be acquired or lost by prescription. *Knox v. Chaloner*, **xl.** 150.

See EASEMENT.

NUISANCE, 5.

## PRESUMPTION.

1. When an officer of a corporation is required to be chosen by ballot, and the record does not specify the mode of his election, the legal presumption is that he was chosen by ballot. *Blanchard v. Dow*, xxxii. 557.

2. Proof, that a person has been legally appointed to an office or place, furnishes a presumption that he continues to hold it during the term prescribed by law, or until he has been legally discharged. *Sawyer v. Knowles*, xxxiii. 208.

3. The lapse of twenty years furnishes a legal presumption that a debt, though secured by a mortgage of land, has been paid. *Sweetser v. Lowell*, xxxiii. 446.

4. Proof, that prohibited sales were made at the store of a trader, of articles belonging to him, by a clerk in his employ, does not alone create a legal presumption of guilt in such trader, though having knowledge of such sales and receiving the pay for the articles sold. *State v. Tibbets*, xxxv. 81.

5. Such proof would authorize a jury to infer that the trader either directed or assented to the sales; but would not justify the Court in deciding, as matter of law, that, unless there should be some opposing proof, he would be equally responsible for the sales as if made by himself. *State v. Tibbets*, xxxv. 81.

6. Until the expiration of twenty years from the recovery of a judgment, there arises, from lapse of time, no degree of presumption that the judgment has been paid. *Thayer v. Mowry*, xxxvi. 287.

7. If, from the payment of State taxes for a succession of years, there arises a presumption that the tax of an earlier year had been paid, that presumption may be repelled by proof. *Hodgdon v. Wight*, xxxvi. 326.

8. A person, proved to be insane, is presumed to continue so until the contrary appears. *Weston v. Higgins*, xl. 102.

9. The presumption of sanity continues until insanity is proved. *Weston v. Higgins*, xl. 102.

10. Where the unlawful killing is proved, and there is nothing to explain, qualify or palliate the act, the law presumes it to have been done maliciously, and the *onus* is upon the accused to rebut the presumption. *State v. Knight*, xliii. 11.

11. In the trial of actions here, the common law of New York may properly be presumed to be similar to that of this State, in the absence of proof to the contrary. *Tillexan v. Wilson*, xliii. 186.

12. Where parties have not entered into any express and specific contract, a presumption arises that they intended to contract according to the general usage, practice and understanding in relation to the subject matter. *Gleason v. Walsh*, xliii. 397.

See *BILLS*, &c., 18, 32, 68, 91, 112, 179.

*EVIDENCE*, 175—208.

*LANDLORD AND TENANT*, 3.

## PRIVITY OF INTEREST.

1. In the trial of an action, the record of a former judgment between the same parties or those in privity with them may be used as evidence. *Glass v. Nichols*, xxxv. 328.

2. One who has been adjudged trustee, because holding goods under a sale fraudulent as against creditors of the principal defendant, is in privity with him; and so is the officer who has attached goods by order of a plaintiff in privity with him. *Glass v. Nichols*, xxxv. 328.

3. Hence, such officer, when sued by such a trustee for having attached the goods pursuant to such order, as a privy to the attaching plaintiff, may use in evidence the record of the judgment against the trustee. *Glass v. Nichols*, xxxv. 328.

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PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

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## PROBATE ACCOUNT.

1. Where the decree of the Probate Court appealed from embraces only the settlement and allowance of a second account of administration, with no reference to the first account, or to any item in it, unless by crediting the balance due on settlement; the appellate court, on such appeal, cannot reëxamine and adjust the first account. *Sturtevant v. Tallman*, xxvii. 78.

2. But the administrator may be required, on the settlement of a second account, to charge himself with any proper items, not contained in the first; and to correct any errors found in the first account. But, when this is not done, nor refused to be done in the Probate Court, it cannot be required to be done on the appeal. *Sturtevant v. Tallman*, xxvii. 78.

3. A guardianship account may be settled by the Judge of Probate, after the minority of the ward has expired. *Pierce v. Irish*, xxxi. 254.

4. Upon such settlement, the allowance of an item of charge by the guardian, for his negotiable note, given to the ward for a specified sum, is to be viewed, not as a decree of the Court that such sum is money still due to the ward, in the hands of the guardian; but as a payment made to the ward. *Pierce v. Irish*, xxxi. 254.

5. Such a charge is lawfully allowed, when the Judge of Probate is satisfied it was the intention of the ward to receive the note as a payment. *Pierce v. Irish*, xxxi. 254.

6. Where a ward, after arriving at full age, has examined the guardianship account, and certified thereon its correctness and his assent to its allowance, the Judge may allow the account, although no notice be given to the ward to attend at the settlement. *Pierce v. Irish*, xxxi. 254.

See PROBATE COURT.



# PROBATE BONDS.

1. A neglect for three years to settle a guardianship account, (except in certain cases,) is a breach of the bond. But if the ward examine the final account, and discharge the balance, by taking a negotiable note for its amount, and afterwards the account be accordingly settled in the Probate Court, the damages accruing to the ward, from the breach of the bond, will be considered as included in the settlement, or waived. *Pierce v. Irish*, xxxi. 254.

2. A suit upon an administration bond can be brought for the benefit of those only who are interested in the estate. *Rawson v. Piper*, xxxiv. 98.

3. A creditor of an estate, who has received for his debt a negotiable note against a third person, of the same amount, secured by a mortgage of land, has no further interest in the estate, although the maker of the note became insolvent and the mortgage was valueless. *Rawson v. Piper*, xxxiv. 98.

4. It is a general rule that suits upon probate bonds are not maintainable, unless authorized by the Judge of Probate, or unless the amount due from the obligor has been ascertained by a judgment of Court. This rule, however, does not apply to suits brought by residuary legatees, whether the legacies be for their own benefit, or in trust for others. *Williams v. Cushing*, xxxiv. 370.

5. A person, appointed in the place of a testamentary trustee of the residuum of the estate who had declined, has the rights of a residuary trustee, in relation to suits upon probate bonds. *Williams v. Cushing*, xxxiv. 370.

6. If there be a residuary trustee, the executor is to pay to him the residuary fund. But if the executor, as such, have paid it to some person having no claim to it, the Judge of Probate cannot allow such payment in settling the executor's account. And a decree, making such allowance, being void, will not preclude the trustee from recovering the amount of the fund in a suit upon the executor's bond. *Williams v. Cushing*, xxxiv. 370.

7. A refusal to pay the just debts of his ward will constitute a breach of the guardian's bond, and the creditor may resort to a suit upon it for indemnity. *Raymond v. Sawyer*, xxxvii. 406.

8. Each probate bond must be specifically approved by the Judge, to be valid, including the bond filed for an appeal from a Judge of Probate. *Matthews v. Patterson*, xlii. 257.

See EXECUTOR, &c., 18, 19, 22, 32, 36, 41, 42, 43, 48.

GUARDIAN, &c., 25, 27.

PROBATE COURT, 2.

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# PROBATE COURT.

1. Under R. S. of 1841, c. 105, "any person aggrieved by any order, sentence, decree or denial of a Judge of Probate, may appeal therefrom to the Supreme Court of Probate," although he was not a party to the proceedings before the Probate Court. *Sturtevant v. Tallman*, xxvii. 78.

2. The Court of Probate can be deprived of its jurisdiction, in the settlement of administrators' accounts, only by some proceeding which would

legally remove the settlement to another tribunal. Its jurisdiction remains, although the administrator had before been cited to settle his account, had neglected to do so, and leave had been granted to the persons interested to commence a suit upon his bond, if no suit be commenced. *Sturtevant v. Tallman*, xxvii. 78.

3. A Judge of Probate cannot hold a Court, for the hearing of a particular case, at any other time or place than those fixed by law, or under R. S. of 1841, c. 105, § 8; and any decree passed in such case will be void. *White v. Riggs*, xxvii. 114.

4. If one of several persons, equally interested, should appear at the hearing of such case, the others, not all appearing, and he, alone, should appeal, still, as the Probate Court had no jurisdiction, the appeal will be dismissed. *White v. Riggs*, xxvii. 114.

5. The power of the Judge of Probate does not extend to an assignment of dower in lands of which the husband was not seized at the time of his death; or of lands of which the husband was so seized, when the right of dower is disputed by the heirs or devisees. *French v. Pratt*, xxvii. 381.

6. Where the Judge refuses a license to sell real estate, to pay debts and charges of administration, and an appeal is taken; and there is no exhibition in the decree, nor in the reasons for the appeal, of the evidence presented to the Judge of Probate; nor does it appear that there was satisfactory proof that the services had been performed, for which the claim was made; nor that the personal property was inadequate to meet what was required, the decrees must be affirmed. *Mayall, pet'r.*, xxix. 474.

7. It is not within the jurisdiction of the Probate Court to decide who are entitled, as legatees, under a will; or to decree to whom, or at what time, legacies or distributive shares shall be paid. The allowance to an executor, for money paid to a legatee, beyond his just proportion, is no protection to the executor. *Smith v. Lambert*, xxx. 137.

8. A decree, granting leave to a creditor of an insolvent estate to institute a suit at common law, under R. S. of 1841, c. 123, § 9, is subject to the right of appeal. *Leighton v. Chapman*, xxx. 538.

9. But the right and power to give such leave is limited to four years from the time administration was granted. *Leighton v. Chapman*, xxx. 538.

10. By the statute of 1821, c. 51, the Court of Probate was empowered, through the agency of commissioners, to divide the estate of an intestate among his heirs at law. *Dean v. Hooper*, xxxi. 107:

11. If the estate were held as a tenancy in common with any other person, the commissioners were to be authorized to make partition between the heirs and such co-tenant; but the co-tenant must have notice of the proceedings, prior to the decree of partition. *Dean v. Hooper*, xxxi. 107.

12. The omission to give such notice was not cured by the attendance of the co-tenant before the commissioners. *Dean v. Hooper*, xxxi. 107.

13. An adjudication by the Judge of Probate, upon a matter over which he has general jurisdiction, unless appealed from, is conclusive, until reversed. *Pierce v. Irish*, xxxi. 254. *Clark v. Pishon*, xxxi. 503.

14. The Judge of Probate of one county has no jurisdiction to grant administration upon the estate of a person, whose domicil, at the time of his decease, was within the State, but not within such county. *Moore v. Philbrick*, xxxii. 102.

15. Such want of jurisdiction, if it appear in the same record which exhibits the grant of administration, is decisive against the validity of the grant. *Moore v. Philbrick*, xxxii. 102.

16. A testamentary trustee had it in charge, by the will, to appropriate the income of the estate to the widow of the testator, as she should "require," for the support of herself and children:—*Held*, that the Court of Probate had not jurisdiction to direct what amount the trustee should appropriate for such support. *Littlefield v. Cole*, xxxiii. 552.

17. On an appeal from a decree of the Judge of Probate, the right to open and close in this Court belongs to the appellant. *Deering v. Adams*, xxxiv. 41.

18. Under R. S. of 1841, c. 105, § 25, a party is "aggrieved" only when the decree operates on his rights of property, or bears directly upon his interest. *Deering v. Adams*, xxxiv. 41.

19. From a decree appointing a guardian to a minor child, the trustees of a fund bequeathed for the benefit of such child have no authority to appeal. *Deering v. Adams*, xxxiv. 41.

20. Where a testamentary trustee of the residuum of the testator's estate has declined to act in that capacity, another person may be appointed by the Judge, in his stead. *Williams v. Cushing*, xxxiv. 370. *Deering v. Adams*, xxxvii. 264.

21. The Probate Court has authority to make partition of real estate, many years after the estate has been settled. *Earl v. Rowe*, xxxv. 414.

22. Where no dispute has been raised respecting the proportion, if any, to which an heir or devisee is entitled, partition may be made by the Judge, unless such proportion appear to him uncertain. If his opinion as to such proportion be erroneous, the remedy is by appeal. *Earl v. Rowe*, xxxv. 414.

23. Under Act of 1817, c. 190, the Judge of Probate had full power to make a division of real estate among the heirs. *Furlong v. Soule*, xxxix. 122.

24. Under Act of February 11, 1789, all lands levied on by the administrator were held to the sole use and behoof of the widow and heirs of the deceased, and could only be distributed by the Judge as personal estate. *Furlong v. Soule*, xxxix. 122.

See APPEAL, 13, 14.

GUARDIAN AND WARD.

HEIR, 9.

PROBATE ACCOUNT.

PROBATE BOND.

## PROCHEIN AMI.

1. A *prochein ami* is not necessarily one of kin, but may be "any one who will undertake the infant's cause," and, according to the theory of the law, is appointed by the Court. *Leavitt v. Bangor*, xli. 458.

2. A *prochein ami* is not, under our statutes, a party to the suit in such a sense as to make him liable for costs. *Leavitt v. Bangor*, xli. 458. *Sanborn v. Merrill*, xli. 467.

3. Neither is he so a party as to have rendered either himself or his wife incompetent witnesses, prior to the passage of the Act of 1856, c. 266. *Leavitt v. Bangor*, xli. 458.

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## PROPRIETORS OF LANDS.

Where the plaintiffs organized themselves into a proprietary, and claimed and exercised control over a township, making sales of the land, holding possession of the contracts made by their agents, and of the notes given on such contracts, and have received payments for the land:—*Held*, that the tenants, holding under one who had recognized their rights, could not dispute their title. *Roxbury v. Huston*, xxxvii. 42.

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## PUBLIC ACTS.

See STATUTES, 15.

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## PUBLIC LOTS.

1. The fact that the lands in a town, reserved for public uses, had been sold and conveyed, could not prevent their legal location. *Argyle v. Dwinel*, xxix. 29.

2. If the treasurer of a town be authorized to convey lands reserved for public uses, on certain conditions, under the statute, a conveyance thereof, without performance of the conditions, is void; and acts of the board of trustees, performed afterwards, which might otherwise amount to a ratification of the treasurer's doings, would be inoperative. *Argyle v. Dwinel*, xxix. 29.

3. The effect of the Act incorporating a part of the plantation of Argyle into a town by the same name was to sanction the location of the public or reserved lands within the plantation, and to assign to the town of Argyle the benefit of those lots which had been located within its corporate bounds. *Argyle v. Dwinel*, xxix. 29.

4. Unfinished processes, commenced by the County Commissioners, for setting off public lots in unincorporated places, under the Act of 1842, were defeated by the Act of 1848, transferring the care of public lots to agents, &c.; and such processes are not embraced in the clause of the latter Act, "saving all actions now pending and causes of action already accrued. *Co. Commissioners, pet'rs*, xxx. 221.

5. Where, in a grant by the State, of a township of land, there are reserved one thousand acres for public uses, according to Act of 1828, c. 393, the fee does not vest in the grantees, upon any condition, limitation or trust whatever, even if no plantation should ever be established there. *Dillingham v. Smith*, xxx. 370.

6. The State has constituted *itself* the trustee, for the future town or plantation. *Dillingham v. Smith*, xxx. 370.

7. Where the County Commissioners set out the reserved land by an actual location upon the earth, duly entered in the records of the District Court, the boundaries, thus fixed, are conclusive upon the public, whether they include one thousand acres or less; and the grantees cannot object that the land set out does not contain one thousand acres; for they may safely convey and warrant the adjoining lands, by such boundaries. Neither is the location invalidated by being taken in two lots, instead of one. *Dillingham v. Smith*, xxx. 370.

8. Where lumber had been cut upon the reserved lots, thus set out, and had been seized and sold by persons claiming to act for the public, it is competent for the purchaser to prove, by parol, that such persons were the acting County Commissioners. *Dillingham v. Smith*, xxx. 370.

9. When a grant of land, made jointly by Maine and Massachusetts, contains a reservation for the support of schools and of public worship within the tract, the right and duty of protecting the reserved part against trespassers belong exclusively to this State, until the beneficiaries shall come into being. *Hammond v. Morrell*, xxxiii. 300.

10. The fee of one-half of such reserved land is held by the State in trust. *Hammond v. Morrell*, xxxiii. 300.

11. The State has the right of causing the reserved part of the tract to be severed from the residue, by a course of prescribed proceedings, and to be set off into lots, for the purposes specified in the grant. *Hammond v. Morrell*, xxxiii. 300.

12. By the prescribed notice given to the grantees of the residue, and by the opportunity given them to be heard in the proceedings for the separation, they are bound by the proceedings in the process. *Hammond v. Morrell*, xxxiii. 300.

13. It is not competent for such grantees, after the separation of the lots, to object that Massachusetts was not a party to the process. *Hammond v. Morrell*, xxxiii. 300.

14. The lots, when thus set off, are deemed to be in the legal possession of the State, until vested in those for whose benefit they were reserved. *Hammond v. Morrell*, xxxiii. 300.

15. In action, brought by the State, for trespass upon such lots, the whole damage may be recovered; and it is no defence, in whole or in part, that Massachusetts has not joined in the suit, or interposed any claim. *Hammond v. Morrell*, xxxiii. 300.

16. Of land reserved and set off for the gospel ministry, &c., in townships not yet incorporated, the county in which it is situated, by the Act of 1842, holds the place of trustee to the parties for whose benefit the reservation was made. *Washington v. Brown*, xxxiii. 442.

17. Upon a bond given to the county, to pay for timber taken from such land, the county may maintain suit, though having no beneficial interest in the avails. *Washington v. Brown*, xxxiii. 442.

18. The Act of 1845, authorizing County Commissioners to grant permits for cutting timber upon the public lots, was repealed by Act of 1848; and the authority of the Commissioners terminated. *Small v. Small*, xxxv. 400.

19. Such permits could operate for no longer time than one year. *Small v. Small*, xxxv. 400.

## QUARANTINE.

1. Health officers are not authorized to take vessels, in quarantine, into their own possession and control, to the exclusion of the owner, or those whom he has put in charge. *Mitchell v. Rockland*, xli. 363.

2. And where such possession and control are taken by health officers or their servants, the town is not responsible. *Mitchell v. Rockland*, xli. 363.

3. The original legal signification of quarantine, was the term of forty days, during which persons who came from foreign ports with the plague were not permitted to go on shore; but the signification of the term has been enlarged and modified by the statute, so as to represent the restriction against vessels having on board other contagious diseases than that of the plague. *Mitchell v. Rockland*, xli. 363.

## QUO WARRANTO.

See WRITS, &c., 5.

## RAILROADS.

1. A railroad company is not bound to maintain fences on the lines of their roads, except where the same passes through enclosed or improved land. *Perkins v. E. R. R. Co.*, xxix. 307.

2. If injury to another's cattle happen, (through want of such fences,) upon common and unenclosed land, it is not legally imputable to the negligence of the company. *Perkins v. E. R. R. Co.*, xxix. 307.

3. If cattle are wrongfully upon the adjoining close, and escape therefrom upon the railroad and are injured, the railroad company are not liable. *Perkins v. E. R. R. Co.*, xxix. 307.

4. Cattle are not presumed as lawfully going at large. There must be proof that the town gave permission. *Perkins v. E. R. R. Co.*, xxix. 307.

5. Under a charter authorizing the construction of a railroad "to the place of shipping lumber," on a tide-water river, the right of location is not limited to the upland or to the shore, but it may be extended across the flats and over tide-water, to a point at which lumber may be conveniently shipped. *Peavey v. C. R. R. Co.*, xxx. 498.

6. After the time has expired, within which a railroad company, by their charter, were to complete their road, they have no authority to take additional lands for the extension of their road, except by consent of the owner. *Peavey v. C. R. R. Co.*, xxx. 498.

7. The charter of the K. & P. Railroad Company provides a remedy for the land owner, to recover damage for the location and construction of the track across his land; and the remedy, thus provided, is in exclusion of the common law remedy. *Mason v. K. & P. R. R. Co.*, xxxi. 215.

8. The injury, done to the owner, by the erection of an embankment upon the site of the road, whereby the communication is destroyed between parts of his land which lie upon opposite sides of the track, is to be included in the damages. *Mason v. K. & P. R. R. Co.*, xxxi. 215.

9. An action to recover damage for destroying such communication, either by taking the strip of the land for the site of the road, or by the erection of such embankment, proceeds, not upon the ground that the land for the road was illegally taken, but that the power, granted by the charter, had been transcended or abused. It therefore presents no basis for a decision as to the constitutionality of that power. *Mason v. K. & P. R. R. Co.*, xxxi. 215.

10. County Commissioners' appraisement of the damage done to an individual, by the location of a railroad across his land, may be revised by a jury, as well upon the application of the railroad corporation, as upon that of the land owner. *Kimball v. K. & P. R. R. Co.*, xxxv. 255.

11. The compensation, provided by statute for damages occasioned by the location and construction of railroads, extends only to real estate and materials taken. *Rogers v. K. & P. R. R. Co.*, xxxv. 319.

12. For damages, indirectly resulting from the lawful acts of a chartered corporation, the law affords no remedy. *Rogers v. K. & P. R. R. Co.*, xxxv. 319. *Whittier v. K. & P. R. R. Co.*, xxxviii. 26.

13. It is competent for the Legislature to authorize permanent erections across tide waters or any other navigable waters, although the navigation may thereby be impaired. *Rogers v. K. & P. R. R. Co.*, xxxv. 319.

14. The charter of the K. & P. R. R. Company, with its additional enactments, authorizes the erection of bridges and causeways across navigable water, but requires them not to be built in such a manner as to prevent the navigation of such water, or to occasion unreasonable detention thereon. *Rogers v. K. & P. R. R. Co.*, xxxv. 319.

15. For the damage occasioned by so erecting the structures as to prevent such navigation, or to occasion such detention, the remedy is not by application to the County Commissioners, but by an action at law. *Rogers v. K. & P. R. R. Co.*, xxxv. 319.

16. By Act of 1842, c. 9, railroad companies are made liable for injuries by fire, communicated by their locomotives, to buildings or other property, and may effect insurance thereon in their own behalf. *Chapman v. A. & St. L. R. R. Co.*, xxxvii. 92.

17. This statute liability is limited to property of a permanent nature, and on which insurance may be effected. *Chapman v. A. & St. L. R. R. Co.*, xxxvii. 92. *Pratt v. A. & St. L. R. R. Co.* xlii. 579.

18. For injuries to other property, by fire, they will only be responsible in consequence of negligence, unskilfulness or imprudence in running or conducting their locomotives. *Chapman v. A. & St. L. R. R. Co.*, xxxvii. 92.

19. If land of the plaintiff, over which there is an established highway, is taken by a railroad company under their charter, no action at law is maintainable. *Whittier v. K. & P. R. R. Co.*, xxxviii. 26.

20. Where a railroad company constructs its track across a highway, in accordance with the directions and orders of the County Commissioners, no action can be sustained against such company, for damages suffered in consequence of their excavations, by the owner of the adjoining land. Nor will they be liable for any damages to such owner by the necessary acts of the

officers of the town in grading down the highway in consequence of the construction of their railroad across it. *Whittier v. K. & P. R. R. Co.*, xxxviii. 26.

21. The provisions of R. S. of 1841, c. 76, attach to all railroad corporations, unless specially exempted therefrom by their charter. *Came v. Brigham*, xxxix. 35.

22. By Act of 1853, c. 41, railroad corporations, required by their charter to keep and maintain legal and sufficient fences on the exterior lines of their roads, are made liable to a forfeiture of one hundred dollars per month, for neglecting that duty. *Norris v. A. R. R. Co.*, xxxix. 273.

23. This Act, being remedial and for the protection of property peculiarly exposed by the introduction of locomotive engines, applies to corporations existing before its passage. *Norris v. A. R. R. Co.*, xxxix. 273.

24. A neglect by the corporation, to erect or maintain such a fence, renders them liable to reimburse any person suffering injury in his property thereby, in an action at common law. *Norris v. A. R. R. Co.*, xxxix. 273.

25. Thus, where the plaintiff's horse, by reason of a defective fence upon the line of a railroad, well known to the company, escaped from his pasture upon the track, and was injured by the engine, the company are responsible for the damages, notwithstanding the engineer was in the exercise of due care, and the fence was originally imperfectly built by the plaintiff for the company. *Norris v. A. R. R. Co.*, xxxix. 273.

26. An omission, on the part of the owner of the land, over which a railroad has been located, to call on the County Commissioners to assess his compensation, will not preclude him from maintaining trespass *quare clausum* against the company, after they have taken his land without making compensation. *Hall v. Pickering*, xl. 548.

27. Nor will an omission, by the corporation, to make the compensation in the way provided by statute, after having taken possession of an individual's land, work a forfeiture of their rights under their charter, to enter upon the land, and have an exclusive occupation, temporarily, as an incipient proceeding to the acquisition of title to, or an easement in it. *Hall v. Pickering*, xl. 548.

28. While the law, under this constitutional provision, allows a reasonable time to the railroad company to make the compensation, after such an exclusive occupation, still, when the company takes this exclusive occupation under a claim of right in fee, as by a deed from the owner, when, in fact, no such right exists, no reasonable time is allowed for making the compensation; and an action of trespass lies against them, by the owner, for all the damages suffered by it. *Hall v. Pickering*, xl. 548.

29. A railroad corporation was authorized by its charter to purchase, or take and hold, so much land of private persons or other corporations, as might be necessary for its corporate use, and, also to take, remove and use, for certain specified purposes, any earth, gravel, stone, timber or other materials, on or from the land so taken: — *Held*, that this did not authorize the servants of the corporation to go upon lands not taken under the charter, and take materials therefrom, against the will and without the consent of the owners of the land. *Parsons v. Howe*, xli. 218.

30. The liability of a railroad company, under the Act of 1842, c. 9, § 5, is not confined either to real or personal estate; but it exists in reference to both. *Pratt v. A. & St. L. R. R. Co.*, xlii. 579.



31. It is liable for damages to growing timber "along its route." *Pratt v. A. & St. L. R. R. Co.*, XLII. 579.

32. The language, "along the route," applies to property near and adjacent to the railroad, so as to be exposed to the danger of fire from the engines. *Pratt v. A. & St. L. R. R. Co.*, XLII. 579.

33. The growing trees of A. stood about three hundred feet from the line of the railroad. Fire from the locomotive engine communicated to materials growing and naturally lying between the premises of A. and the railroad, and extended to and damaged A.'s growing timber:—*Held*, that the company was liable for the damage. *Pratt v. A. & St. L. R. R. Co.*, XLII. 579.

34. The time of taking real estate, under R. S. of 1841, c. 81, § 4, must be the time of entering into the occupation of the land; and there may be cases where a reasonable time, after a temporary occupation, will not expire before three years. *Nichols v. S. & K. R. R. Co.*, XLIII. 356.

See ASSUMPSIT, 2.

CERTIORARI, 23.

COUNTY COMMISSIONERS, 40.

CORPORATION.

## RAPE.

1. By the law of this State, rape consists in a man's ravishing and carnally knowing any female of the age of ten years or more, by force and against her will. *State v. Blake*, XXXIX. 322.

2. The acts necessary to constitute this crime must be done "by force;" and these words, or some equally significant, in addition to the other language used in the statute, cannot be dispensed with in an indictment founded thereon. *State v. Blake*, XXXIX. 322.

3. The word "violently," substituted instead of "by force," is not sufficient. *State v. Blake*, XXXIX. 322.

## REAL ACTION.

- I. WHEN MAINTAINABLE.
- II. PLEADINGS BY THE PLAINTIFF.
- III. PLEADINGS BY THE DEFENDANT.
- IV. EVIDENCE.
- V. JUDGMENT, AND ITS EFFECT.

### I. WHEN MAINTAINABLE.

1. If the demandant, in a writ of entry, shows no title in himself to the real estate demanded, he cannot recover, although it should appear that the tenant also had no title. *Derby v. Jones*, XXVII. 357.

2. The demandant introduced a series of deeds from 1786, under which the title was traced to himself. One of the deeds was made in 1807, the grantor being then disseized. The tenant made title in himself under a different source, as shown by a series of deeds from 1804, under which possession had been held from that to the present time:—*Held*, the demandant was not entitled to recover. *Crooker v. Jewell*, xxxi. 306.

3. The owner of land, though disseized in 1804, conveyed the same by deed, in 1807, to the demandant, who entered into possession:—*Held*, that the demandant's action is not maintainable, if the subsequent acts of ownership, exercised by the disseizor, were of as important a character, and of as long a continuance, as those of the demandant. *Crooker v. Jewell*, xxxi. 306.

4. A real action upon a mortgage cannot be sustained after the debt secured by it has been paid. *Williams v. Thurlow*, xxxi. 392.

5. Administrators *de bonis non* cannot maintain a real action, in that capacity. *Brown v. Strickland*, xxxii. 174.

6. At common law, an action for real estate was abated by the death of the tenant. By our statute, it may be continued by notice to the legal representatives of the tenant, and to all others interested as heirs, &c. And, upon the death of the tenant in a real action, no further proceedings can be had in the suit until the appearance of the heirs or notice to them. *Bridgham v. Prince*, xxxiii. 174.

7. An unsealed agreement by a doweress, (after having recovered judgment for dower,) made with the warrantor of the judgment-tenant, that she would receive a specified sum yearly during life, in lieu of dower, will not bar her right to receive possession by writ of entry, after a neglect of payment. But it reserves to her the right of rescinding when the payments fail; and, unless there be such a rescission, her right to recover mesne profits in a writ of entry does not arise. *Sargent v. Roberts*, xxxiv. 135.

8. A writ of entry is maintainable by a mortgager, except against the mortgagee and those claiming under him, notwithstanding the tenant, by long occupation, has become entitled to betterments. *Huckins v. Straw*, xxxiv. 166.

9. The demandant in a real action, of property in the possession of another, can only recover on the strength of his own title, and not on the weakness of the tenant's. *Webster v. Hill*, xxxviii. 78.

See DOWER.

MORTGAGE, 11.

SEIZIN & DISSEIZIN.

## II. PLEADINGS BY THE PLAINTIFF.

10. If, pending a writ of entry by several demandants, the tenant purchase the share of one of them, the writ may be amended by striking out that one's name. *Chadbourne v. Rackliff*, xxx. 354.

11. After notice to quit, the grantee may elect to treat the grantor, if in possession, as holding by wrong, and not as tenant; and the bringing of a writ of entry is such an election. Such writ, with the possession thereby obtained, precludes a recovery for use and occupation. *Larrabee v. Lumbert*, xxxiv. 79.

12. To entitle a demandant to recover for rents and profits, in a writ of entry, he must set forth a claim for them in his declaration. And, though specially declared for, rents and profits are recoverable only up to the date of the writ. *Larrabee v. Lumbert*, xxxvi. 440.

13. Rents and profits, accruing before that date, cannot be recovered in any subsequent action of any form; but those accruing subsequently, and prior to the time when possession is taken by the demandant, may be recovered in trespass for mesne profits. *Larrabee v. Lumbert*, xxxvi. 440.

See AMENDMENT, 8, 14.

### III. PLEADINGS BY THE DEFENDANT.

14. Questions raised by pleading, and issues taken thereupon, followed by a verdict and judgment, cannot be agitated in another suit between the same parties or their privies, concerning the same subject matter. *Hobbs v. Parker*, xxxi. 143.

15. A reference, made by a party in pleading, to documents concerning a point not in controversy, will not invalidate his proceedings, although such document contain representations at variance with the allegations of the party making the reference. *Hobbs v. Parker*, xxxi. 143.

16. Thus, in a real action, if a party, in order to elucidate his case, refer in his plea to a plan of land not in controversy, his rights are not concluded by the reference, although the plan present views in conflict with the allegations of the plea. In such case he may show the plan to be erroneous. *Hobbs v. Parker*, xxxi. 143.

17. To a writ of entry, the tenant pleaded in abatement, that, since the last continuance, a deputy sheriff for the county, having in his hands, for service, an execution against the demandant, in favor of a third person, in virtue thereof ousted and disseized the tenant, and set off to the creditor the demanded premises, and delivered to him the seizin and possession thereof, which the creditor has ever since held, and still holds:—on demurrer, the plea was held to be bad. *Burnham v. Howard*, xxxi. 569.

18. It is no defence to a writ of entry, that the tenant owns a building upon the land, which he had erected by the landlord's consent; for, even after a recovery against him, he is entitled to a reasonable time in which to remove it. *Bullen v. Arnold*, xxxi. 583.

19. Upon a plea of disclaimer, if the tenant, at the commencement of the suit, was in possession of any part of the land disclaimed, the demandant must be the prevailing party. *Put. F. School v. Fisher*, xxxiv. 172.

20. When the tenant would disclaim a portion of the premises, it must be made up and filed according to law, or it cannot be available. Such disclaimer cannot be incorporated into the general issue. *Put. F. School v. Fisher*, xxxviii. 324.

21. The general issue admits the tenant to be in possession of all the land not specially disclaimed. *Perkins v. Raitt*, xliii. 280.

22. Where the disclaimer does not extend to the whole of the demandant's land, the tenant is guilty of disseizin, and has no right to retain the possession of any portion of it, however minute, which is capable of admeasurement. *Perkins v. Raitt*, xliii. 280.

See ABATEMENT, 5, 18.

## IV. EVIDENCE.

- (a) ON THE PART OF THE DEMANDANT.
- (b) ON THE PART OF THE TENANT.

(a) *On the part of the demandant.*

23. Where a deed of a township of land has been made, and there are excepted tracts therein, amounting to half of the whole township, it is incumbent on the grantee, claiming title to a particular lot under such deed, to show that such lot is not included in the excepted tracts. *Smith v. Bodfish*, xxvii. 289.

24. It is incumbent on the demandant, claiming title under a deed from a corporation executed by one in the character of its agent, to prove that the corporation, by a legal vote, had authorized such person to make the conveyance. *Miller v. Ever*, xxvii. 509.

25. Where the deed, under which the demandant claims title, is introduced by him without objection, this furnishes *prima facie* evidence of its execution and delivery on the day of its date. *Woodman v. Smith*, xxxvii. 21.

26. When a demandant claims title by a mortgage, and the tenant, by a later quitclaim deed from the same grantor, and earliest on record, on proof that the latter had notice of the mortgage prior to the delivery of his deed, the demandant must recover; and the common grantor is a competent witness of the fact without a release. *Paul v. Frost*, xl. 293.

(b) *On the part of the tenant.*

27. In a writ of entry, adverse possession will not establish title in the tenant, unless commenced twenty years before the suit. *Saco W. P. Co. v. Goldthwaite*, xxxv. 456.

28. Under a plea of disclaimer, title in a third person cannot be proved. *Put. F. School v. Fisher*, xxxiv. 172.

29. Under the general issue, the tenant cannot give in evidence a conveyance by the demandant of any portion of the premises, to one under whom he does not claim; and which does not show that the demandant was not seized according to his writ. *Put. F. School v. Fisher*, xxxviii. 324.

See BETTERMENTS, 1.

## V. JUDGMENT AND ITS EFFECT.

30. A writ of entry by heirs, to recover land which belonged to their ancestor, is not barred by the pendency, in the Court of Probate, of a petition by the administrator for license to sell the same for the payment of debts. Such license, if obtained, will not be defeated by a judgment in favor of the heirs. *Chadbourne v. Rackliff*, xxx. 354.

31. A judgment for the demandant in a real action, with possession taken under it, will preclude the tenant in that action from afterwards asserting, against such demandant, any personal property in the buildings which he had erected on the land. *Doak v. Wiswell*, xxxiii. 355.

RECEIPT.

1. In action upon a promissory note, a receipt in full of all demands, given by the plaintiff to the defendant, if unexplained or uncontradicted, will defeat the action. *Cunningham v. Batchelder*, xxxii. 316.

2. A receipt in full of all demands, though purporting to be for a sum merely nominal, if unexplained, will discharge all debts then existing, even such as are not payable until a subsequent day. *Cash v. Freeman*, xxxv. 483.

See EVIDENCE, 157—159.

RECEIVER OF STOLEN GOODS.

See INDICTMENT, 40, 41, 65.

RECOGNITION OF TITLE.

See PROPRIETORS OF LAND.

RECOGNIZANCE.

- I. IN CRIMINAL CASES.
- II. ON APPEAL IN CIVIL ACTIONS.
- III. ACTIONS UPON RECOGNIZANCES.

I. IN CRIMINAL CASES.

1. In a recognizance, taken by a magistrate, for the prosecution of an appeal to the District Court, in a criminal prosecution, his jurisdiction should appear in the proceedings. *State v. Magrath*, xxxi. 469. *State v. Wormell*, xxxiii. 200. *State v. Hartwell*, xxxv. 129.

2. That jurisdiction does not appear, if the recognizance fails to show in what county the supposed offence was committed. *State v. Magrath*, xxxi. 469.

3. The penal sum of a recognizance of a witness in a criminal case, conditioned for his appearance, &c., is limited by the statute to twenty dollars, when taken by a magistrate. *State v. Wormell*, xxxiii. 200.

4. A recognizance taken on the Lord's day, "between the midnight preceding and the sunsetting of the same day," to prosecute an appeal in a criminal prosecution, is void. *State v. Sukur*, xxxiii. 539.

5. A recognizance, taken before a magistrate, must show his jurisdiction. *State v. Hartwell*, xxxv. 129.

6. Where, upon an examination before a magistrate, the defendant recognized for his appearance, &c., the recognizance must show that the offence had been committed, and that there is probable cause for believing the accused to be guilty of it. *State v. Hartwell*, xxxv. 129.

7. If it show merely that "there is good cause to suspect" the accused to be guilty, the recognizance is void. *State v. Hartwell*, xxxv. 129.

8. Where the statute requires a defendant to enter into a recognizance to "prosecute" his appeal, and the condition is to "enter" his appeal, the latter term is included in the former. *State v. Boies*, xli. 344.

9. A recognizance should recite the cause of caption. *State v. Brown*, xli. 535.

See JUSTICE OF THE PEACE, 2.

## II. ON APPEAL IN CIVIL ACTIONS.

10. A recognizance, taken in the District Court, conditioned to enter and prosecute an appeal made to the Supreme Judicial Court, in a civil action, becomes a part of the record in the District Court; and an action of debt can be maintained thereon, as a record, on a failure to perform the condition. *Longley v. Vose*, xxvii. 179.

11. A recognizance, entered into upon the filing of exceptions in the District Court, and reciting the filing of the exceptions, is not rendered void by further reciting that the excepting party "appealed," and by being conditioned that he should prosecute the appeal. *Merrick v. Farwell*, xxxiii. 253.

12. A recognizance, given upon an appeal from a judgment on process of forcible entry, &c., is void, if it be conditioned for any performance or payment not prescribed by statute. *Dennison v. Mason*, xxxvi. 431.

13. Thus, it is void, if it require the appellant to prosecute his appeal with effect; or to pay all costs that may arise in the suit after the appeal; or to pay the intervening rent. *Dennison v. Mason*, xxxvi. 431.

14. Where a recognizance is entered into, on an appeal from a judgment of a justice of the peace in a civil action, conditioned that the appellant should "personally appear" at the appellate Court, and pay "all intervening damages and costs," the recognizance is void, as well as the appeal. *French v. Snell*, xxxvii. 100. *Lane v. Crosby*, xlii. 327.

See JUSTICE OF THE PEACE, 2, 3.

## III. ACTIONS UPON RECOGNIZANCES.

15. Costs, due on a recognizance to prosecute an appeal, &c., are payable as soon as a taxation of them is made. And a tender of such costs, made subsequently to such taxation, is without legal effect. *Merrick v. Farwell*, xxxiii. 253.

16. In *scire facias*, upon a recognizance to the State, in a prosecution for crime, the Court, in order to discover what crime is charged, can look only to the recognizance. *State v. Lane*, xxxiii. 536.

17. The Court cannot assume that acts, which may be consistent with innocence, and are not charged to be in violation of law, are criminal, merely by reason of their being so denominated by the magistrate. *State v. Lane*, xxxiii. 536.

18. Where a defendant had appealed from a decision rendered under the Act of 1855, c. 166, and had recognized in the usual form, he is liable if the appeal is not entered, notwithstanding the repeal of the Act; the forfeiture claimed under the recognizance being no part of the punishment for the offence. *State v. Boies*, xli. 344.

19. The right to enforce a recognizance does not depend upon the guilt or innocence of the accused. *State v. Boies*, xli. 344.

20. The remedy authorized by the Act of 1855, c. 166, for a breach of the condition of a recognizance, is only cumulative. *State v. Boies*, xli. 344.

21. A writ of *scire facias*, on a recognizance, referring to no charge against the defendant, and containing no reference to any charge against him in any complaint or indictment, is bad, and insufficient to authorize proceeding to trial. *State v. Brown*, xli. 535.

22. A recognizance, conditioned that the defendant should appear in Court from "day to day during the term," does not furnish a foundation for a writ of *scire facias*. *State v. Brown*, xli. 535.

23. A party cannot be required to come into Court actually in session, to answer "such matters and things as shall be objected against him," without any specific charge being alleged or set forth. *State v. Brown*, xli. 535.

24. *Scire facias* upon a recognizance, taken before the Supreme Judicial Court in a criminal prosecution, may properly be made returnable to a term of the Court holden for the transaction of criminal business. *State v. Brown*, xli. 535.

## RE-COMMITMENT OF REPORTS.

1. After a report of referees has been accepted, and before judgment, the presiding Judge, for good cause, has power to order the re-commitment of the report to the same referees. *Mayberry v. Morse*, xxxix. 105.

2. The same causes which would suffice for the ordering of a new trial might ordinarily require a re-commitment. *Mayberry v. Morse*, xxxix. 105.

See ARBITRATION, 14, 28, 55, 59, 62, 64.

PETITION FOR PARTITION, 23, 33.

## RECORD.

1. Where the record to be proved is a record of the Court before which the proof is to be made, a production and inspection of the record is the proper mode of proof. *Longley v. Vose*, xxvii. 179.

2. Where the docket shows that a party recognized with his surety to prosecute an appeal from the District Court to the Supreme Judicial Court,

and the clerk died before the recognizance was extended upon the record, it is competent for a subsequent clerk, by direction of the Court, (but not otherwise,) to complete the record. *Longley v. Vose*, xxvii. 179.

3. The memoranda of the clerk upon the docket must stand as the record, until a more extended one can be made therefrom. *Longley v. Vose*, xxvii. 179.

4. In debt on a judgment in another Court, if there be introduced two copies of the record duly authenticated, and yet variant from each other; it seems, the plaintiff must fail because of uncertainty in his proof. *Tibbets v. Baker*, xxxii. 25.

5. In such case, it seems, the certifying officer, or any person who has compared the copies with the original, may testify which is the true copy. *Tibbets v. Baker*, xxxii. 25.

6. In a suit upon a judgment, recovered before a justice of the peace, the plaintiff is bound to establish the existence of the record. For that purpose, it is not sufficient to introduce a book, alleged to contain the record, without some proof of its authenticity. *Wentworth v. Keizer*, xxxiii. 367.

7. The contents of a justice's record are to be proved by an authenticated copy. His certificate, alleging what facts appear by the record, is not receivable as proof. *English v. Sprague*, xxxiii. 440.

8. In a suit between individuals, the public records of a city, of the location or alteration of its streets, are admissible. *Barker v. Fogg*, xxxiv. 392.

9. Thus, where it became material for a party to show at what time a public street was actually widened:—*Held*, competent to introduce the records of the city to prove at what time the widening was authorized. *Barker v. Fogg*, xxxiv. 392.

10. In such case, in the absence of opposing evidence, it is allowable for the jury to infer, that the actual widening was not made until after the same was duly authorized. *Barker v. Fogg*, xxxiv. 392.

11. Papers and documents, used and filed in a case, if not incorporated into the record, constitute no part of it. *Paul v. Hussey*, xxxv. 97. *Starbird v. Eaton*, xlii. 569. *Valentine v. Norton*, xxx. 194. *McArthur v. Starret*, xliii. 345. *Came v. Bridgham*, xxxix. 35. *Buck. B. R. R. Co. v. Benson*, xliii. 374.

12. The allegations of a justice's record, in matters within his jurisdiction, are entitled to the same credit as are allegations contained in the records of the higher tribunals. *Paul v. Hussey*, xxxv. 97.

13. Courts have control over their own records of a suit, until final judgment be rendered; and they may bring forward, from a previous term, any uncompleted action, and alter the docket entry pertaining to it, as justice may require. *Woodcock v. Parker*, xxxv. 138.

14. A magistrate, who has certified his record in an incomplete form, is bound, under leave of Court, to complete the record, and to amend the certificate accordingly. *State v. Maher*, xxxv. 225.

15. The record of a magistrate cannot be impeached by parol testimony. *Dolloff v. Hartwell*, xxxviii. 54.

16. Notes, filed in a case, constitute no part of the record, and although not corresponding with those described in the declaration, cannot be regarded as error. *Came v. Bridgham*, xxxix. 35. *Buck. B. R. R. Co. v. Benson*, xliii. 374.



17. Papers, presented to a common law court, and acted on as evidence, constitute no part of the record. *Starbird v. Eaton*, XLII. 569.

See ERROR.

EVIDENCE, 280—291.

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## RECORD OF BIRTHS AND DEATHS.

See TOWN CLERK.

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## REFEREES.

An appointment of a person “to see whether” certain work was according to previous contract does not confer the powers of a referee; and his opinion may be controlled by evidence. *McKinney v. Page*, XXXII. 513.

See ARBITRATION.

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## REGISTER, AND REGISTRY OF DEEDS.

1. The register of deeds is the proper officer to certify the copy of the records of a levy on execution. *Gray v. Garnsey*, XXXII. 180.

2. The general rule, that titles and interests in real estate are to appear of record, has been controlled, to some extent, by the statute, which gives a lien upon land, for labor, &c., furnished in the erection or repair of buildings thereon. *Parsons v. Copeland*, XXXIII. 370.

3. By R. S. of 1841, c. 91, § 26, the notice, by force of which a prior unregistered deed may prevail against a subsequent conveyance, must be *actual*. Prior to that statute, implied or constructive notice might have that effect. *Blethen v. Dwinal*, XXXV. 556.

4. The certificate of the register of deeds, in these words:—“Writ—Samuel Kendall v. Richard Look; dated Nov. 21st, 1850. Attachment dated Nov. 30, 1850. Recorded, Dec. 30, 1850.”—is not sufficient proof that the copy of the return of an attachment of real estate was “lodged” in the register’s office. *Kendall v. Irving*, XLII. 339.

See DEED, 22—44.

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## REGULATIONS IN MANUFACTURING ESTABLISHMENTS.

1. In manufacturing establishments, the employers may introduce prudential and effective regulations to be observed by the operatives. *Harmon v. Salmon Falls Manuf’g Co.*, XXXV. 447.

2. Such regulations may provide, in themselves, for a forfeiture of wages, in case of a willful non-compliance. *Harmon v. Salmon Falls Manuf'g Co.*, xxxv. 447.

3. A person entering such establishment, as an operative, with knowledge of such regulations, is considered as having assented to them, though he may not have signed them; and such assent constitutes a valid contract. *Harmon v. Salmon Falls Manuf'g Co.*, xxxv. 447.

4. No suit in law or equity can be maintained against the employer to recover the wages forfeited under such contract. *Harmon v. Salmon Falls Manuf'g Co.*, xxxv. 447.

5. That such operative had knowledge of such a provision in the regulations, may be inferred from the employer's having delivered to him a printed copy of them. *Harmon v. Salmon Falls Manuf'g Co.*, xxxv. 447.

6. When the regulations, known to the operative, provided for a forfeiture of wages, in case of his leaving the service without having given previous notice, if he would rely upon having quit by the employer's consent, or upon having fulfilled the term for which he had contracted to labor, the *onus* is upon him. *Harmon v. Salmon Falls Manuf'g Co.*, xxxv. 447.

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## RELATIONSHIP.

By intendment of R. S. of 1841, c. 1, § 3, rule 22, relationship, within the sixth degree, is an interest which disqualifies a person for deciding upon rights wherein he is so related to one of the parties. *McKeen v. Gammon*, xxxiii. 187.

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## RELEASE.

1. In assumpsit against joint debtors, it is no defence that one of them has been discharged from his share of the debt by an unsealed instrument in writing, although upon good consideration. *McAllister v. Sprague*, xxxiv. 296.

2. Should the discharged debtor be molested on account of the debt, his remedy is by special action on the discharge. *McAllister v. Sprague*, xxxiv. 296.

3. An heir apparent, who releases, with his father's knowledge and consent, all his present and future interest in his father's estate, with a covenant that neither he, nor any one through him, shall ever claim any right to the same, and there is no fraud on the part of the grantee, is precluded from subsequently setting up title to any part of the estate, either as heir or devisee. *Curtis v. Curtis*, xl. 24.

See DOWER, 1, 41, 46, 47.

WITNESS, 39, 42, 43, 47.

RENTS AND PROFITS.

See EXECUTION, 51. REAL ACTION, 12, 13.

REPEAL.

See STATUTES, 16—21, 23, 24.

REPLEVIN.

- I. WHO MAY MAINTAIN REPLEVIN.
- II. WHEN MAINTAINABLE.
- III. BOND.
- IV. JUDGMENT FOR RETURN.
- V. PLEADINGS, EVIDENCE AND PRACTICE.
- VI. SERVICE.

I. WHO MAY MAINTAIN REPLEVIN.

1. Replevin can be maintained only by one having the right to possession. *Pierce v. Stevens*, xxx. 184.

2. As a general rule, a chattel cannot be replevied from one part owner by another part owner. *Hardy v. Sprowle*, xxxii. 322.

3. But it seems, after a delivery to the applicant, under R. S. of 1841, c. 114, § § 65 and 66, he may replevy the property, even from his co-tenant, if it be taken or detained by him. *Hardy v. Sprowle*, xxxii. 322.

4. But such delivery must give to the applicant actual custody of the property. And until *such* delivery, the bond given by the applicant has not become operative. *Hardy v. Sprowle*, xxxii. 322.

5. A commission merchant, who has sold a part of the goods left with him for sale, may maintain replevin for the residue of the goods, even against an officer who has attached them against the general owner. *Sewall v. Nichols*, xxxiv. 582.

6. And his consent to become keeper of the goods for the attaching officer does not defeat his right to maintain replevin. *Sewall v. Nichols*, xxxiv. 582.

7. Where property attached has been receipted for, with a promise to pay a sum certain or re-deliver the property, and the same property is subsequently attached by another officer, the former attaching officer cannot maintain replevin against the latter for such property. *Waterhouse v. Bird*, xxxvii. 326.

8. Goods, seized upon a warrant issued in due form, against their owner, by a magistrate having jurisdiction under a valid statute, cannot be replevied by him. *Musgrave v. Hall*, xl. 498.

9. A sale of goods, even on credit, if effected through false representations of the vendee, may be treated as void by the vendor, who may maintain replevin therefor without any previous demand. *Hall v. Gilmore*, XL. 578.

## II. WHEN MAINTAINABLE.

10. Replevin may be maintained against one who has wrongfully taken the property of the plaintiff, and, for a time, detained it, but who has sold and delivered it to another, prior to the commencement of the suit. *Sayward v. Warren*, XXVII. 453.

11. S. delivered to W. a quantity of hides for his note on eight months. At the same time W. gave to S. a written agreement, that, if his note should not be paid at maturity, he would return the leather made from the hides, to S., to be sold by him, and the surplus proceeds, after payment of the note, to be paid to W. :—*Held*, that the property in the hides passed to W., and that S. could not maintain replevin for them. *Southwick v. Smith*, XXIX. 228.

12. Where defendant had mill logs on the landing, and the plaintiff voluntarily drew other logs into the same pile, marked the same as the former, and the defendant took them all into possession :—*Held*, that the plaintiff could not maintain replevin for his proportion of the logs, but only for such of them as he could identify as his. *Dillingham v. Smith*, XXX. 370..

13. If, in replevin, the same writ is used in different counties to reclaim the plaintiff's goods, the error, to be available, must be shown in abatement. *Hall v. Gilmore*, XL. 578.

## III. BOND.

14. If the name of the plaintiff be put upon the replevin bond by one without any authority therefor, it is not good, though signed by two sureties. *Garlin v. Strickland*, XXVII. 443.

15. Where the purchaser of the debtor's right to the property attached, at a sale in bankruptcy, has released to the attaching officer all claim thereto, the latter cannot recover any thing on the replevin bond for the use of such debtor or his assignee, although it did not appear that the assignee had observed all the rules prescribed in making the sale. *Howe v. Handley*, XXVIII. 241.

16. Under the R. S. of 1841, c. 130, it is not necessary that the plaintiff in replevin should sign the bond, or that it should appear, on the bond, that it was given in his behalf. *Howe v. Handley*, XXVIII. 241.

17. The damages, recovered by the attaching officer in the action of replevin, being recovered in trust, are not conclusive upon the parties in a suit upon the replevin bond. *Howe v. Handley*, XXVIII. 241.

18. Where the value of the property replevied might be expected to be diminished by the use of it, and by lapse of time, the obligors in the replevin bond are bound by the value of the property named in the bond. *Howe v. Handley*, XXVIII. 241.

19. When the original debtor has received a discharge in bankruptcy, and his assignee has discharged all claim against the officer, for property attached, the damages to be recovered upon the replevin bond, to be retained for the

plaintiff's own use, are the amount of the judgment for costs recovered in the action of replevin, with interest from the time of the judgment; his reasonable expenses incurred in that action, and interest for the same time; and his reasonable expenses incurred in the suit upon the bond; and, also, to recover, for the use of the creditor, interest at the rate of twelve per cent. per annum, on the value of the goods, as alleged in the bonds, from the time of his judgment to the time when the attachment was dissolved. *Howe v. Handley*, xxviii. 241.

20. The bond to be taken by an officer, before replevying property, is to be in double its true value. *Kimball v. True*, xxxiv. 84.

21. For his failure to take such "bond, it is no defence that, in the writ, the property is stated to be of a value less than its true value; or that the writ prescribes, as the amount of the bond to be taken, a sum less than double the true value. And the damage, for such failure, is the amount of the injury thereby occasioned. *Kimball v. True*, xxxiv. 84.

22. In construing a replevin bond, the intention of the parties must govern. If the intention be in doubt, regard must be had to the general purpose and object of the instrument. And, upon the assumption that the parties acted in good faith, the construction should be such as to render the instrument available for its purpose, rather than such an one as will defeat it. *Green v. Walker*, xxxvii. 25.

23. Thus, in an instrument intended and used as a replevin bond, a condition, by which the plaintiff obligor is bound to pay to *himself*, instead of the defendant, the damages and costs, &c., will be deemed a clerical error, and will not defeat the efficiency of the bond. *Green v. Walker*, xxxvii. 25.

24. A replevin bond with only one surety is fatally defective, if objected to by plea in abatement, or by motion seasonably filed. *Greeley v. Currier*, xxxix. 516.

#### IV. JUDGMENT FOR A RETURN.

25. Upon the plea of *non cepit*, with brief statement that the special property and the right of possession are in the defendant and not in the plaintiff, if there be a verdict of *non cepit*, the defendant is entitled to a judgment for return. *Moulton v. Bird*, xxxi. 296.

26. In replevin, a verdict of *non cepit* and a judgment for return are not conclusive upon the question of property. They only show that, for some cause, the defendant is entitled to possession. *Moulton v. Smith*, xxxii. 406.

27. A judgment for return, founded upon a verdict of *non cepit*, is not a bar to a suit involving the question of property. *Moulton v. Smith*, xxxii. 406.

28. If, in judgment for return, there be no assessment of damages occasioned by the detention, and if, upon the restitution writ no return of the goods was obtained, the damage for detention may be assessed and allowed in an action upon the replevin bond. And damages will be computed from the time of the original taking. *Smith v. Dillingham*, xxxiii. 384.

29. When proceedings in replevin are quashed for defect in the bond, the plaintiff cannot contest, by testimony, the right of the defendant to a return of the property. By the illegality of the proceeding, it is "made to appear"

to the Court, on motion, that the property should be returned. *Greeley v. Currier*, xxxix. 516.

30. Where there is a judgment for return of a part of the goods replevied, and a judgment for the plaintiff as to the remainder, both parties are entitled to costs. *McLarren v. Thompson*, xl. 284.

## V. PLEADINGS, EVIDENCE AND PRACTICE.

31. In replevin, a plea or brief statement, alleging that the defendant was not in possession of the property when replevied, nor claimed to own it, is bad in substance. *Sayward v. Warren*, xxvii. 453.

32. In replevin for cattle impounded, when the defendant justifies the taking, he must show a full and entire compliance with the statute, or he becomes a trespasser *ab initio*. *Morse v. Reed*, xxviii. 481.

33. In replevin, after issue joined upon the merits, it is too late to move a dismissal of the action, because no replevin bond was returned. *Wilson v. Nichols*, xxix. 566.

34. The plea of *non cepit* does not admit the property to be in the plaintiff when accompanied by a brief statement denying the fact. *Dillingham v. Smith*, xxx. 370. *Moulton v. Bird*, xxxi. 296. *Cooper v. Bakeman*, xxxii. 192.

35. When the pleadings do not admit the property to be in the plaintiff, or do not present merely an issue upon its being the property of the defendant, replevin cannot be maintained without proof of property in the plaintiff. *Dillingham v. Smith*, xxx. 370.

36. If neither of the parties request instruction that the jury should find the value of the property, they are presumed to have acquiesced in the valuation contained in the writ. *Heald v. Cushman*, xxx. 461.

37. The defendant, with a plea of *non cepit*, may file a brief statement that the property is in himself, or in a stranger, and that it is not in the plaintiff. *Moulton v. Bird*, xxxi. 296.

38. In a sale of chattels for ready pay, the vendor may waive the condition of ready pay, and, by delivery to the purchaser, part with the property. After such waiver and delivery, the vendor, in replevin for the goods, cannot avail himself of a fraud between the purchaser and the vendee of the purchaser. *Mixer v. Cook*, xxxi. 340.

39. In a case of replevin, submitted on questions of law, without any stipulation as to the allowance of damages, the Court, at another term, after judgment of nonsuit and return, cannot assess the defendant's damages, or submit that question to a jury. *Dillingham v. Smith*, xxxii. 182.

40. Damages, in such a case, are recoverable in a suit upon the replevin bond. Per SHEPLEY, C. J. *Dillingham v. Smith*, xxxii. 182.

41. Upon a plea of *non cepit* with brief statement that the property is in the defendant, and not in the plaintiff, it is incumbent on the plaintiff to prove property in himself. *Cooper v. Bakeman*, xxxii. 192.

42. If the brief statement merely allege property in the defendant, without denying it to be in the plaintiff, the burden of proving ownership is on the defendant. Per WELLS, J. *Cooper v. Bakeman*, xxxii. 192.

See ABATEMENT, 6, 19.

COSTS, 18.

REVIEW, 16.

# VI. SERVICE.

43. An officer has no authority to serve a writ of replevin, without first having taken such bond as the law requires. *Garlin v. Strickland*, xxvii. 443. *Greeley v. Currier*, xxxix. 516.

44. If an officer have served a replevin writ, the legal presumption is, that he complied with the law by taking a replevin bond, although his return does not expressly state that fact. *Shorey v. Hussey*, xxxii. 579.

## REPLEVIN OF A PERSON.

1. The writ *de homine replegiando* lies only in favor of a person unlawfully deprived of his liberty. *Richardson v. Richardson*, xxxii. 560. *Hutchings v. Van Bokkelen*, xxxiv. 126. *Farnsworth v. Richardson*, xxxv. 267. *Gurney v. Tufts*, xxxvii. 130.

2. It can be brought in his name only, though it may be at the procurement of another. *Richardson v. Richardson*, xxxii. 560.

3. It cannot be used for the benefit of another person, although such other person, by contract, may have a lawful claim to his services or to the custody of his person. *Richardson v. Richardson*, xxxii. 560. *Farnsworth v. Richardson*, xxxv. 267.

4. A female infant, of the age of seventeen months, residing with her father, and under his care and protection, is not so restrained of liberty by him as to authorize any one to replevy her person; even if the father had previously assigned to such person the care and education of the child. And, whether such an assignment can be lawfully made, *non dicitur*. *Richardson v. Richardson*, xxxii. 560.

5. From the Act, granting the writ *de homine replegiando*, it is inferable that one person may be entitled to the custody of another, although without a civil or criminal process. *Hutchings v. Van Bokkelen*, xxxiv. 126.

6. If a father, after having made an assignment of the services or society of his minor child, have re-taken the child into his own keeping, the remedy of the assignee, (if any he have,) is not by replevin, but by action on the contract. *Farnsworth v. Richardson*, xxxv. 267.

7. Whether such assignment can be valid, *quere*. *Farnsworth v. Richardson*, xxxv. 267.

## RESCUE.

1. In an action to recover the statute penalty for rescuing animals to prevent an impounding, an allegation that they were found in the highway cannot be treated as surplusage. It is material, and must be proved as laid. *Cleaves v. Jordan*, xxxiv. 9.

2. Such an averment is not supported by proof that the animals were found upon a town way. *Cleaves v. Jordan*, xxxiv. 9.

## RESERVATION.

A reservation in a deed is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources. *Moulton v. Faught*, xli. 298.

See DEED, 71—99.

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## RESERVED LANDS.

See PUBLIC LOTS.

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## RESIDUARY LEGATEE.

See EXECUTORS, &c., 44, 66.

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## REVENUE LAWS.

1. When property has been seized and libeled by a collector of customs, for a breach of the U. S. revenue laws, it is to be considered in the custody of the law, until the claimant obtains the possession by order of the Court. *Barnes v. Taylor*, xxix. 514.

2. Therefore, a demand made upon the collector, by the marshal holding an order of restoration, and a refusal by the collector to deliver the property, would not prove a conversion. *Barnes v. Taylor*, xxix. 514.

3. In such case, a portion of the property was abstracted, while thus in the custody of the law, and the claimant obtained an order for the restoration of the whole, and actually received possession of the part which remained:—*Held*, he could not maintain trover against the collector for the abstracted part; but his remedy should be sought in the same Court which ordered the restoration. *Barnes v. Taylor*, xxix. 514.

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## REVERSION AND REVERSIONERS.

1. Though the reversioner regained possession, by wrong, of land which was under lease, yet, he may maintain trespass against a mere stranger to the lease who has invaded his possession. *Rollins v. Clay*, xxxiii. 132.

2. Reversioners, entitled to land only upon the determination of a life estate, have no right to authorize the cutting, (during the life estate,) of trees standing upon the land. *Simpson v. Bowden*, xxxiii. 549.



3. A., having an estate for life in certain premises, conveyed them, by deed of warranty, to B., who continued in possession over twenty years:—*Held*, that, at common law, the remainder man or reversioner, having no right to immediate possession, cannot lose his title by adverse possession; and that, during the continuance of the particular estate, he is not bound to enter to defeat a wrongful possession; also, that the statute is in accordance with the common law in this respect; and also, that the estate of the tenant, under the deed, is a life estate; and that he would not, by the common law, be entitled to compensation for any improvements. *Pratt v. Churchill*, XLII. 471.

4. Where the reversioner or remainder man has no right of entry or possession, the seizin of the tenant, while a particular estate continues, is not adverse. *Pratt v. Churchill*, XLII. 471.

## REVIEW.

1. A review of the judgment and proceedings on a petition for partition can be granted only upon the application of a party to the former process, or of one representing the interest of a party. A person, interested in the estate divided, cannot become a party to the proceedings after the partition has been ordered, and the proceedings have been finally closed. *Elwell v. Sylvester*, XXVII. 536.

2. Where a petition for a review of the judgment and proceedings on a petition for partition has been presented in the name of one as guardian, and in behalf of certain minors, and notice has been ordered thereon, and the opposing party has appeared, it cannot be amended so as to make the minors the petitioners by such person, as their guardian. *Elwell v. Sylvester*, XXVII. 536.

3. A review will be granted where a judgment has been recovered in violation of a contract between the parties. *Hobbs v. Burns*, XXXIII. 233.

4. But where a judgment creditor will remit so much of the judgment as he ought to have credited in payment, or will indorse that amount as paid upon the execution, there will be no occasion to grant a review. *Hobbs v. Burns*, XXXIII. 233.

5. Where a petition for review alleged that the judgment was obtained by default, which was occasioned by mistake, and without fault of the petitioner, and also stated the circumstances under which it took place, without mentioning the names of the witnesses, by whom the petitioner expected to prove the circumstances, the petitioner was permitted to amend his petition, against objection, by inserting the names of such witnesses. *Haskell v. Hazard*, XXXIII. 585.

6. Under R. S. of 1841, c. 123, § 4, a notice, allowing such time as the law prescribes for parties in other cases, and returnable when the respondent may be heard, whether at the same time or another, is sufficient. *Colby v. Dennis*, XXXVI. 9.

7. Under the Act of 1852, the granting of writs to review judgments against certificated bankrupts is not at the discretion of the Court; but the statute is imperative as to all cases coming within its purview. *Colby v. Dennis*, XXXVI. 9.

8. It operates on remedies only and not on rights, and is, therefore, not liable to the charge of unconstitutionality. *Colby v. Dennis*, xxxvi. 9.

9. It allows no limitation to the time within which the review may be sought. *Colby v. Dennis*, xxxvi. 9.

10. It was repealed by the Act of 1853, but the repeal excepted all actions pending, within which were embraced petitions for review. *Colby v. Dennis*, xxxvi. 9.

11. Judgment on a review will be rendered, as the merits of the case, upon law and evidence, may require, without any regard to the former judgment, except as provided in R. S. of 1841, c. 124, § § 12 and 13. *Dunlap v. Burnham*, xxxviii. 112.

12. Where the party against whom a judgment has been rendered, on review obtains a verdict, the judgment rendered on that verdict is a substitute for the former judgment, and thereby makes the latter a nullity. *Dunlap v. Burnham*, xxxviii. 112.

13. Where the defence to an action failed because evidence of the contents of a document was admitted, the loss of the original not having been properly established, the fact that the document was subsequently found is not a sufficient cause for a review. *Carpenter v. Sellers*, xxxviii. 427.

14. In petitions for partition, a review may be granted by law, whenever the Court deem it reasonable and for the advancement of justice. *Wilbur v. Dyer*, xxxix. 169.

15. Where, in such process after final judgment, it was discovered that the commissioners had made a mistake in their division:—*Held*, that a review should be granted. *Wilbur v. Dyer*, xxxix. 169.

16. If, in replevin, the defendant reviews the action, and reduces the damages recovered against him, he is the prevailing party and entitled to costs of review. *Dodge v. Reed*, xl. 331.

17. The remedy for a mistake, in casting interest upon a note, is by petition for review. *Starbird v. Eaton*, xlii. 569.

18. A party, who suffered judgment by default in the original suit, cannot have judgment reversed by writ of error, upon the ground that the notes, on which the judgment was based, were fraudulently attested, after having been delivered to the payee. His remedy, if any he has, is by review. *Starbird v. Eaton*, xlii. 569.

See AMENDMENT, 28.  
EXCEPTIONS, 42.

## REWARD.

A reward, promised by a jailer for information whereby a prisoner, who had escaped from his custody, might be re-captured, cannot be recovered by one who gave the required information, but assisted in the escape, and withheld this fact at the time the reward was offered. *Hassan v. Doe*, xxxviii. 45.

## RIGHT OF ENTRY AND RE-ENTRY.

The right of re-entry for a breach of condition in a conveyance of land pertains only to the grantor and his legal representatives. It is not included among the rights mentioned in R. S. of 1841, c. 94, § 1, and cannot be taken on execution. *Bangor v. Warren*, xxxiv. 324.

See DEED, 12.

SEIZIN, &c., 1.

## RIOT.

1. In a criminal prosecution for a riot, it is no defence that two persons only were engaged in the illegal physical fact, if a third person was aiding and abetting them at the time, by his presence. *State v. Straw*, xxxiii. 554.

2. An allegation that the defendant and others, being assembled, did perform a described unlawful act, in a violent, tumultuous and riotous manner, to the terror and disturbance of the people, sufficiently charges a riot. *State v. Boies*, xxxiv. 235.

3. To obstruct and break up a justice's court, in a violent and tumultuous manner, to the disturbance and terror of the people, is an unlawful act, whether the person acting as justice was or not commissioned. *State v. Boies*, xxxiv. 235.

## RIPARIAN RIGHTS.

1. If one person had acquired lawful right to float his logs over the land of another, without his consent, through an artificial channel made by the latter, and is resisted and obstructed in the use of it, by the owner of the land, and contracts to pay him a sum of money for the removal of such obstruction, and for the permission to float his logs, such contract is unlawful and void. *Dwinel v. Barnard*, xxviii. 554.

2. Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly, for boating, floating logs, &c., and should turn them into a new channel, he would thereby authorize the public to use them in the new channel, as they had used them in their former channel. *Dwinel v. Barnard*, xxviii. 554.

3. But if a person without right should open a sluice or channel, on his own land, and thereby divert the waters of a stream, river or lake, from their natural and accustomed course, without causing any obstruction elsewhere, the public would not thereby become entitled to their use over his land. The public would not be entitled to enter upon his land, and to use the waters in his channel, canal, or sluice, made, perhaps, for the purpose of operating machinery, because some other person had obstructed the flow and egress of

the waters, from a distant point of such stream, river or lake. *Dwinel v. Barnard*, xxviii. 554.

4. Although the law may not require the lapse of any particular time, to authorize the inference of a dedication to the public for use, there must be evidence that the owner offered it, and designed to do so, for public or common use. *Dwinel v. Barnard*, xxviii. 554.

5. To establish a toll, the channel, way, passage, or other easement, must be exposed and offered for the use of all who may have occasion to use it, for a settled and established compensation. It must have become such a common channel, way, or passage, by the consent or act of the owner, that he cannot maintain trespass against any person, who may use it, paying the established toll. *Dwinel v. Barnard*, xxviii. 554.

6. Riparian proprietors do not have the entire interest in the waters of a river, but the whole community have rights therein, which entitle them to regulate its public use; and these rights may be exercised by the Legislature as the agents of the public. *Moor v. Veazie*, xxxi. 360.

7. If, in improving the navigation of the Penobscot river, under the Act of July 30, 1846, it becomes necessary to build a dam, which will have the effect of preventing the passage of boats, rafts, &c., no damages can be recovered against the grantee, except by riparian proprietors upon whose land the dam is actually constructed. The presumptions will always be, that such dams are necessary, and that they were erected in good faith. *Moor v. Veazie*, xxxi. 360.

8. When the space between high and low water is in part or wholly bare, passengers may pass over the shore without hindrance, and without liability for damages to the riparian proprietor. *State v. Wilson*, xlii. 9.

9. The occupation of a navigable river with logs can give no rights against the riparian proprietors, unless such occupation, during its continuance, occasioned injury or damage. *Brown v. Black*, xliii. 443.

See AQUATIC RIGHTS.  
CORPORATION, 20.

## RULES OF COURT.

1. The present rules of the Court, and for chancery practice are found in Vol. xxxvii. 567, *et seq.*

2. The 34th rule of the Supreme Judicial Court does not authorize the introduction of office copies of deeds as evidence, when "the realty" is not the subject matter of the suit. *Hutchinson v. Chadbourne*, xxxv. 189.

3. The 26th rule of the Court is applicable to civil cases only. *State v. McAloon*, xl. 133. *State v. Hobbs*, xxxix. 212.

4. By the 21st rule, all objections to a report of referees are required to be in writing; without which, the Court is precluded from considering them. *Mayberry v. Morse*, xliii. 176.

See ABATEMENT, 28.  
BILLS, &c., 161.  
DOWER, 54.

EVIDENCE, 25.  
PLEADING, 21.  
PRACTICE, 102 — 105.

## RISK.

See SALE, 25.

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## SABBATH.

See LORD'S DAY.

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## SALE.

- I. DELIVERY.
- II. CONSTRUCTION AND TERMS OF SALE.
- III. WHEN VOIDABLE.
- IV. SPECIAL SALES.
- V. SALE UNDER LEGAL PROCESS.
- VI. EVIDENCE.

*For Sales for Taxes, See TAX.*

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## I. DELIVERY.

1. An absolute sale of personal property cannot be legally proved in a court of law to have been made only to secure the purchaser for liabilities assumed, and be good against the creditors of the vendor. *Richardson v. Kimball*, xxviii. 463.

2. Such sale will transfer all the right and interest of the vendor to the purchaser, although the property was under attachment at the time of the sale. *Richardson v. Kimball*, xxviii. 463.

3. If, by reason of an attachment of personal property, a purchaser of it from the debtor cannot receive an actual possession, a symbolical delivery of it will be sufficient. *Wheeler v. Nichols*, xxxii. 233. *Vining v. Gilbreth*, xxxix. 496.

4. A purchase of personal property, made by a debtor with his own money and for his own benefit, exposes the property to his creditors, although the bill of sale may have been made to a third person, for whom he pretended to purchase, and although the vendor may have supposed that he was selling to such third person. *Godding v. Brackett*, xxxiv. 27.

5. One, having purchased and paid for a specified quantity of an article, acquires no title to it, until separated from the residue. *Stone v. Peacock*, xxxv. 385.

6. Until a delivery, actual or constructive, the claim of a vendee rests in contract, for the breach of which the remedy is by action. *Stone v. Peacock*, xxxv. 385.

7. In the sale of personal property, delivery is essential to its validity, as against every one but the vendee. *Vining v. Gilbreth*, xxxix. 496.

8. But where the article is ponderous, a symbolical or constructive delivery will be sufficient. *Vining v. Gilbreth*, xxxix. 496.

9. Thus, the sale of a shop will be effectual against creditors by the delivery of its key, and that, too, at a place distant from the shop sold. *Vining v. Gilbreth*, xxxix. 496.

## II. CONSTRUCTION AND TERMS OF SALE.

(a) UPON CONDITION.

(b) WHEN PROPERTY PASSES.

(c) VALIDITY OF SALE, AND LIABILITY OF PARTIES.

(d) WARRANTY.

### (a) *Upon condition.*

10. A contract, signed by a party upon receiving the possession of personal property, and containing his promise to pay for the same, and also an agreement that the property shall remain the property of the other party till the payment should be made, is not a bailment, but a conditional sale. *Bryant v. Crosby*, xxxvi. 562.

### (b) *When property passes.*

11. To convey that which constitutes a part of the real estate, but which, by a severance may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required as to convey land, unless a severance first takes place. *Trull v. Fuller*, xxviii. 545.

12. In a sale of chattels for ready pay, the seller may waive the ready pay, and, by delivery to the purchaser, part with the property. *Mixer v. Cook*, xxxi. 340.

13. Testimony, that the plaintiff made a sale of goods to the defendant, at a stipulated price, and charged them, (in his presence,) in account; that nothing was said as to the length of the credit; that defendant did not take the goods, nor order them to be forwarded, will not sustain an action for the price of the goods, although the plaintiff forwarded them by express to the city of the defendant's residence; there being no proof that he received them. *Sackett v. Lowell*, xxxii. 164.

14. The title to goods will pass by a sale, without delivery from the true owner, though, at the time of the sale, they are in the tortious possession of a third person claiming them. *Cartland v. Morrison*, xxxii. 190.

15. The manufacture of an article, pursuant to the order of a customer, does not transfer the title. *Moody v. Brown*, xxxiv. 107.

16. Neither does the tender of the article, when so manufactured. Nor leaving it with the customer, against his will. But there must be an acceptance, either express or implied. *Moody v. Brown*, xxxiv. 107.

17. If it be not shown that it was the intention of the parties to make the sale absolute and complete, the property does not pass, so long as any act upon it remains to be done by them. *Stone v. Peacock*, xxxv. 385.

18. A purchase of growing crops, though paid for, passes no title against the creditors of the vendor, until possession or delivery be had. *Stone v. Peacock*, xxxv. 385.

19. Unless such possession and delivery be had, prior to the death of the vendor, and to the issuing of a commission of insolvency upon his estate, the title is in the administrator in trust for creditors. *Stone v. Peacock*, xxxv. 385.

20. The sale and delivery of a chattel in an unfinished state, but which, by agreement of parties, is left in the control of the vendor to finish, is sufficient to vest the property, after its completion, in the vendee, as against creditors. *Bartlett v. Blake*, xxxvii. 124.

21. A bargain for personal property of more value than thirty dollars, without any delivery, or any thing in earnest to bind it, or part payment, or some sort of memorandum of it, in writing, signed by the party with whom the bargain was made, does not affect the title. *Head v. Goodwin*, xxxvii. 181.

22. A grant of goods, which do not belong to the grantor, at the time of the grant, is void. And, if the grantor subsequently acquire title, it requires some new act on his part, evidential of executing the sale, to transfer the title to the grantee. *Head v. Goodwin*, xxxvii. 181. *Pratt v. Chase*, xl. 269.

23. Where A. sold one-half of a chaise to which he had no title, and afterwards purchased the chaise, and the same night delivered it to the custody of him to whom he had sold one-half of it, without any avowal that the delivery was to effectuate the former sale, this was not such a new act as to transfer the property. *Head v. Goodwin*, xxxvii. 181.

24. Where the owner of a large quantity of corn in bulk sells a certain number of bushels therefrom and receives his pay, and the vendee takes away a part, the property in the part sold vests in the vendee, although it is not measured or separated from the heap. *Waldron v. Chase*, xxxvii. 414.

25. Such property, left in the charge of the vendor, remains at the risk of the vendee. *Waldron v. Chase*, xxxvii. 414.

26. Where the heap, in which such property was left, was mostly destroyed by fire, the owner is not liable for any part of that saved, in assumpsit by the vendee, without some evidence from which a promise may be implied. *Waldron v. Chase*, xxxvii. 414.

27. Where the owner of goods, living and having his place of business in Massachusetts, sends his clerk into this State to obtain orders, and a memorandum is here given to him for goods of a greater value than thirty dollars, which he agrees shall be supplied, and which are subsequently sent by the owner, the sale is not perfected until the owner has put them up and actually parted with their possession. *Banchor v. Cilley*, xxxviii. 553.

28. Under such circumstances the sale is in Massachusetts; and whether the articles could be lawfully sold must depend upon the laws of that State. *Banchor v. Cilley*, xxxviii. 553.

29. A sale of personal property and a receipt acknowledging payment, with delivery of a portion, do not necessarily transfer the title to the whole property sold. The intention of the parties in the delivery is to govern, which question is for the jury. *Pratt v. Chase*, xl. 269.

(c) *Validity of sale, and liability of parties.*

30. If a bill of sale is in its form absolute, and is made without any other consideration than to secure the purchaser for liabilities assumed, it is still valid except as to the creditors of the vendor. And such sale will transfer

all the right and interest of the vendor to the purchaser, although the property was under attachment at the time of sale. *Richardson v. Kimball*, xxviii. 463.

31. Although a bill of sale be made on the Lord's day, one not a party to the sale, and who has no interest in the property, cannot prevent a recovery by the purchaser, by showing that he violated the statute in acquiring the title. *Richardson v. Kimball*, xxviii. 463.

32. If one wrongfully sell the plaintiff's goods, the receipt of money from him by the plaintiff, on account of such goods, would not be a ratification of the sale, if the plaintiff would have had a right, without ratifying the sale, to receive the money. *White v. Sanders*, xxxii. 188.

33. The sale of an article, delivered and carried away, may be valid, although the price remains to be ascertained by an admeasurement at another stipulated time and place. And the admeasurement, when so made, although differing from one made at the time and place of delivery, will control in determining the price. *Cushman v. Holyoke*, xxxiv. 289.

34. Where the quantity of logs sold was to be ascertained by the survey of an agreed surveyor, if the purchaser should desire it, such desire may be inferred from the fact that the purchaser procured such survey, although without notifying the seller. *Cushman v. Holyoke*, xxxiv. 289.

35. Where saw-logs were purchased, to be driven to the boom by the purchaser, and to be paid for at the scale there made, and a part of the logs was left by the way upon the intervalles and shoals:—*Held*, that the purchaser was not chargeable for any logs so left, if, in the driving, he used such care and diligence as prudent men ordinarily use in their own affairs. *Cushman v. Holyoke*, xxxiv. 289.

36. A sale of goods may be valid between the vendor and vendee, though made with a design by both of them to defraud the creditors of the vendor. *Thompson v. Moore*, xxxvi. 47.

37. In a suit by the vendee, for the value of the goods, against a third person who had appropriated them to his own use, the plaintiff's fraudulent design in the purchase cannot be set up in defence. *Thompson v. Moore*, xxxvi. 47.

38. The insolvency of the vendor at the time of the sale of a chattel in an unfinished state, his treatment of the property as his own, in completing it after such sale, do not furnish conclusive evidence of a fraudulent sale; but those *indicia* of fraud may be explained so as to make the sale valid as against the creditors of the vendor. *Bartlett v. Blake*, xxxvii. 124.

39. To render a sale of personal property valid without a written contract, where nothing is paid, there must be a legal delivery. *Means v. Williamson*, xxxvii. 556.

40. But it is not necessary for such delivery, that the property should pass into the hands of the vendee; if it is so situated, that he is entitled to, and can rightfully take possession of it at his pleasure, it is sufficient, although, by his request, it may have continued in the custody of the vendor. *Means v. Williamson*, xxxvii. 556.

41. A sale and delivery of a quantity of boards sufficient to make a certain number of sugar box shoos, is valid, although no survey was ever made. *Rogers v. Humphrey*, xxxix. 382.



(d) *Warranty, and liability of parties.*

42. A vendor of personal property is not liable for defects of any kind, in the thing sold, unless there be fraud or an express warranty on his part. *Kingsbury v. Taylor*, **xxix.** 508.

43. Where the defendant sold winter rye for seed spring rye, and the plaintiff thereby lost his crop, an action of deceit will not lie, unless the defendant knew it to be winter rye. *Kingsbury v. Taylor*, **xxix.** 508.

44. An affirmation or representation in relation to the quality of a chattel, at the time of sale or exchange, is considered a warranty, when it is so intended by the parties, and is not mere matter of opinion. *Hillman v. Wilcox*, **xxx.** 170. *Bryant v. Crosby*, **xl.** 9. *Randall v. Thornton*, **xlili.** 226.

45. If the seller represent the article to be sound, when he knows that it is unsound, and the parties rely on that representation as a warranty, the seller is liable. And the purchaser may elect to pursue his remedy, either in tort or assumpsit. *Hillman v. Wilcox*, **xxx.** 170.

46. The sale of personal property, in the possession of the vendor, at a fair price, raises a warranty of title. *Huntingdon v. Hall*, **xxxvi.** 501.

47. *Aliter*, if the property be not in possession of the vendor; when, if there be no assertion of ownership in him, no implied warranty of title arises. In such case, the maxim, *caveat emptor*, applies. *Huntingdon v. Hall*, **xxxvi.** 501.

48. A warranty, to be effectual, must be intended as such by the parties; but it is sufficient, if the words used implied an undertaking, on the part of the owner, that the thing sold was what it was represented to be. *Bryant v. Crosby*, **xl.** 9. *Randall v. Thornton*, **xlili.** 226.

49. No expression of opinion, however strong, would import a warranty. *Bryant v. Crosby*, **xl.** 9.

50. It is not essential that the word "warrant," or any precise form of expression be used to create an express warranty; but if the vendor, at the time of the sale, affirm a fact as to the essential qualities of his goods, as an inducement to the sale, in clear and distinct terms, and the vendee purchases on the faith of such affirmation, that will constitute an express warranty. *Randall v. Thornton*, **xlili.** 226.

51. The certificate of a master carpenter, as to the capacities of the ship, is to be taken as matter of description, and not a warranty, unless so intended by the parties. *Randall v. Thornton*, **xlili.** 226.

### III. WHEN VOIDABLE.

(a) BY VENDOR.

(b) BY VENDEE.

(a) *By vendor.*

52. A vendor, who, by the fraud of the other party, has been induced to part with his property, may rescind the contract within a reasonable time, and reclaim his property. *Emerson v. McNamara*, **xli.** 565.

53. Such contract is voidable only; and, in order that the vendor may reclaim his property, or recover its value, he must first return, or tender, what he received in payment therefor, unless payment was made by the note of the vendee. *Emerson v. McNamara*, **xli.** 565.

54. And the return, or tender, must be made before the commencement of the suit. *Emerson v. McNamara*, xli. 565.

See CONTRACT, 42—52.

(b) *By the vendee.*

54. Where one, though without fraud, sells property with a warranty of its quality, the vendee may rescind the contract, if the property be not of the quality warranted. *Marston v. Knight*, xxix. 341.

55. If a party would rescind a contract, obtained by fraudulent representations, he must restore whatever he received under it. *Tisdale v. Buckmore*, xxxiii. 461.

56. If a contract, though not signed by the vendor, describe the property as "in good order and condition," such description is equivalent to a representation; and, if he knew it to be untrue, at the time of making it, will vacate the contract. *Bryant v. Crosby*, xxxvi. 562.

#### IV. SPECIAL SALES.

57. In relation to a sale by the Land Agent, of property belonging to the State, which he was authorized to make only upon certain prescribed public notifications, the Legislature may ratify the sale and confirm the conveyance, although the prescribed notifications had not been given. *Hodgdon v. Wight*, xxxvi. 326.

58. Where, on failure of the shareholders in an incorporated company to pay the legal assessments upon them, the statute authorized a sale of the shares at auction, under an order from the directors to the treasurer, upon his giving the notices required, and a right to recover of the corporators the balance of assessment which may remain unpaid, a sale made by the treasurer, under the authority of a committee appointed by the directors, is illegal and void. *York & C. R. R. Co. v. Ritchie*, xl. 425.

59. The directors cannot delegate their powers in such cases. *York & C. R. R. Co. v. Ritchie*, xl. 425.

60. Nor can such a sale be upheld under an order from the directors in the alternative. It must be absolute. *York & C. R. R. Co. v. Ritchie*, xl. 425.

#### V. SALE UNDER LEGAL PROCESS.

61. A sale of goods, made by an officer on execution, must be regarded as a legal transfer of the property, although he may not have kept it four days after the taking, and before the sale. *Richardson v. Kimball*, xxviii. 463.

62. A sale of a vessel by an officer, on execution, conveys nothing but the vessel as it existed at the time of the sale. *Richardson v. Kimball*, xxviii. 463.

63. No title to personal property can be acquired by the purchaser, at a sale on execution, subject to a prior attachment. *Fuller v. Field*, xxxix. 297.

See EXECUTION, 103, 104.

## VI. EVIDENCE.

64. In an action for goods sold and delivered, proof that the goods were purchased by defendant of the plaintiffs, as a partnership, known by their style and name; that a bill of goods was made and delivered to the defendant, who fully examined it, and made no objection thereto; and that the goods were delivered on board a vessel by him designated; is sufficient to authorize a verdict for the plaintiff. *Wight v. Stiles*, xxix. 164.

65. If a written contract, for the bailment of property, contain a recital that the same, for a valuable consideration, was previously sold, transferred and delivered by him to the bailor, it is evidence that such previous contract was executed, and the title to the property passed to the bailor, although portions of it were crops not harvested. *Bryant v. Crosby*, xl. 9.

## SALVAGE.

1. Salvage can only be obtained in courts of admiralty jurisdiction. *Pike v. Balch*, xxxviii. 302.

2. Where one claims title to property under an unlawful sale, he cannot afterwards claim possession against the owner for disbursements made and services rendered in saving the property. *Pike v. Balch*, xxxviii. 302.

## SCHOOLS.

1. The certificate of a majority of the superintending school committee, produced by the school teacher to the agent employing him, is valid under R. S. of 1841, c. 17, although that majority did not act together in the examination. *Stevens v. Fassett*, xxvii. 266.

2. If one, over twenty-one years of age, voluntarily attends a town school, and is received as a scholar by the instructor, he has the same rights and duties, and is under the same restrictions and liabilities, as if under that age. *Stevens v. Fassett*, xxvii. 266.

3. When a scholar, in school hours, intrudes himself into the instructor's desk, and refuses to leave it on the request of the instructor, such scholar may be lawfully removed by the instructor. And, for that purpose, he may immediately use such force, and call to his assistance such aid from any other person, as is necessary to accomplish the object, without the direction or knowledge of the superintending school committee. *Stevens v. Fassett*, xxvii. 266.

4. The penal statute of 1850, c. 159, art. 10, § 13, for the protection of schools, is applicable to private schools regularly established and in operation for instruction in the art of writing. *State v. Leighton*, xxxv. 195.

See CONSTITUTIONAL LAW, 27, 28.

## SCHOOL DISTRICT.

1. It is not essential that the application for a warrant from the selectmen to call a school district meeting, should be recorded or produced; or that the application should be recited in the warrant. That such application had been made, may be proved by parol. *Soper v. Livermore*, xxviii. 193.

2. Where it appeared that there was no school house in the district, a return, upon the warrant to call the meeting, made by the proper person, that he had notified, &c., "by posting up four copies of this warrant, one on the sign post at the confluence of B. and F. roads, one on the corner of the blacksmith shop, one on the Methodist meeting house, and one in the post office, all of which places are in said district," is sufficient under R. S. of 1841, c. 17, § 24. *Soper v. Livermore*, xxviii. 193.

3. Where, at a legal school meeting, the district, after having voted to build a school house, and having chosen a building committee to build the house, and "ascertain the probable sum of money that such a house can be built for," &c., voted to "raise a sufficient sum to defray all the expenses incident to the building of the house;" and subsequently, after having built the house, reported, at an adjourned meeting, the amount expended, which report was accepted; and thereupon the clerk certified to the assessors the amount reported:—*Held*, it was sufficient to authorize the assessment and collection of the amount. *Soper v. Livermore*, xxviii. 193.

4. A scrupulous observance of the most approved formalities, in the proceedings of our numerous and various municipal corporations, is not to be expected. Per WHITMAN, C. J. *Soper v. Livermore*, xxviii. 193.

5. The collector of taxes of a town has the same powers, and is under the same obligations, to collect school district taxes, as in case of town taxes. *Smyth v. Titcomb*, xxxi. 272.

6. And the town treasurer, to enforce their collection. *Smyth v. Titcomb*, xxxi. 272.

7. In discontinuing and re-constructing its school districts, a town may make its action to be conditional, dependent upon the consent of the districts to be affected. *Smyth v. Titcomb*, xxxi. 272.

8. And such conditional action is not a delegation of authority. *Smyth v. Titcomb*, xxxi. 272.

9. By the Special Act of 1848, c. 140, the village school district in Brunswick was confirmed and legalized. *Smyth v. Titcomb*, xxxi. 272.

10. If a school district have legally voted to raise a sum of money, for purposes within their authority, and the assessors assess the tax, such assessment is not rendered inoperative by the omission of the clerk to certify the vote to the assessors. *Smyth v. Titcomb*, xxxi. 272.

11. A school district has no authority to raise money for fuel, or to make itself liable for it. *Estes v. Bethel*, xxxiii. 170.

12. A vote to hire money, passed by a school district at a meeting of which no previous notice had been given, creates no liability upon the district to repay money borrowed in pursuance of such vote. *Lander v. Smithfield*, xxxiii. 239.

13. A vote subsequently passed, at a legal meeting, "to pay the debts due from the district," is no admission of indebtedness for money hired under the vote of the unauthorized meeting. *Lander v. Smithfield*, xxxiii. 239.

14. A school district, not formed by the town in pursuance of statutory provisions, has no corporate powers. *Tucker v. Wentworth*, xxxv. 393.

15. The appointment of an agent, by the town, for a school district which has no existence, will not create one. *Tucker v. Wentworth*, xxxv. 393.

16. An assessment of taxes, by the assessors of a town, pursuant to the vote of such a district, raising money for any purpose, is illegal. *Tucker v. Wentworth*, xxxv. 393.

17. Any inhabitant of such a district, whose property shall be distrained by virtue of the assessors' warrant to collect such tax, may recover its value of the assessors. *Tucker v. Wentworth*, xxxv. 393.

18. Two or more districts uniting, according to the provisions of the Act of 1847, c. 25, § 3, do not thereby abolish the original districts, or create a new one. It merely authorizes the several districts to use a portion of their school money, in concert, for greater facility in the instruction of their more advanced scholars, without impairing the rights or obligations of the original districts to maintain their own schools. *Tucker v. Wentworth*, xxxv. 393.

19. A school district is not divested of its property in its school house, by an alteration, by the town, of the lines of such district, though, by such alteration, their school house is left within the limits of another district. *Whittier v. Sanborn*, xxxviii. 32.

20. For the removal of such a house, built, under a license, upon the land of another, the owner of the land can maintain no action of trespass, when no unnecessary damage is done to the freehold. And the district, when in actual possession, can authorize a third person to make such removal. *Whittier v. Sanborn*, xxxviii. 32.

21. But the district, unless its meeting is legally notified, can confer, by its vote, no authority upon a third person to enter on the land of another and remove a school house therefrom, although they were the owners of the house. *Whittier v. Sanborn*, xxxviii. 32.

22. School district meetings must be notified, in accordance with the Act of 1850, c. 193, art. 2, § 5, or in accordance with the vote of the district, at a legal meeting, under § 7, of the same article, to make their proceedings binding. *Jordan v. Lisbon*, xxxviii. 164.

23. Whether, after a district, at a legal meeting, authorizes future meetings to be called under a notice differing from that required by § 5, a legal meeting might not be called in accordance with § 5, *quere*. *Jordan v. Lisbon*, xxxviii. 164.

24. A school district, at a legal meeting, may ratify and confirm proceedings of previous meetings, which were not strictly legal. *Jordan v. Lisbon*, xxxviii. 164.

25. A committee chosen at an illegal meeting, by their acts in superintending the building of a school house, cannot make the district liable to pay for it. *Jordan v. Lisbon*, xxxviii. 164.

26. Where there is no legal contract on the part of a district to build a school house, nor any acceptance of the house, the building of such a house within the limits of the district imposes no legal obligation upon its members to pay for it. *Jordan v. Lisbon*, xxxviii. 164.

27. The proceedings of school districts can be proved only by the record, or a copy thereof, properly authenticated. Parol proof of them is incompetent. *Jordan v. Lisbon*, xxxviii. 164.

28. Unless it appears, (under the Act of 1850, c. 193, art. 2, § 12,) that the majority were opposed to raising *any* sum, or a less sum than that proposed, there is no such "disagreement" as will authorize the town to assess a tax upon the district for the purpose designated. The mere refusal to vote for one sum named will not confer jurisdiction upon the town. *Powers v. Sanford*, xxxix. 183.

29. A member of such district, whose property is taken to pay a tax assessed by authority of the town, where no "such disagreement" appeared, may recover it back of the town. *Powers v. Sanford*, xxxix. 183.

30. Such action would only lie against the district, where it was proved that the tax had been received and applied to the use of its members. *Powers v. Sanford*, xxxix. 183.

31. By R. S. of 1841, c. 14, § 56, as amended, the assessors of towns, who are required to assess any tax upon a school district, are liable only for their own personal faithfulness and integrity; and further liabilities, if any, shall rest solely with such school district. This imposes no responsibility upon the district for errors committed by the town. *Powers v. Sanford*, xxxix. 183. *Trim v. Charleston*, xli. 504.

32. A committee of three or more persons, duly appointed by a school district, to superintend the erection of a school house, and laying out and expending the money of the district, if they employ another person to build the house, need not maintain an action in their own names for such services, but it may be brought in his own name. *Junkins v. U. S. District*, xxxix. 220.

33. A majority of such committee may employ one of their own number for such service, and, unless there is a fraudulent or corrupt dealing, such person may recover, in his own name, the amount of his claims against the district. *Junkins v. U. S. District*, xxxix. 220.

34. Where the district raised a certain sum *towards* purchasing land and erecting a school house of prescribed dimensions, they can interpose no objection, to a claim made against them under a contract with their committee, that a larger sum was expended by the committee, than that named in the vote. *Junkins v. U. S. District*, xxxix. 220.

35. Nor is it any defence to such claim, that the school house was worth no more than the money voted. *Junkins v. U. S. District*, xxxix. 220.

36. Such contractor can only recover for his own services, not for what he has paid to another for his bill against the district. *Junkins v. U. S. District*, xxxix. 220.

37. The statute does not prescribe the place where a school house may be purchased, nor the manner in which it may be removed or repaired. *Tozier v. Vienna*, xxxix. 556.

38. Where, by the records, the school district officers appear to have been qualified by a magistrate, the presumption is, in the absence of all testimony, that they were made by the proper recording officer. *Tozier v. Vienna*, xxxix. 556.

39. When, by a vote of a district, the selectmen are requested to locate their school house, their acts, under such vote, are recommendatory only. *Tozier v. Vienna*, xxxix. 556.

40. A vote to raise money to build a school house is void, if not passed at a legal meeting of the district. *Haines v. Readfield*, xli. 246.

41. A tax, based on such illegal vote, and paid under protest, may be recovered back in an action at law against the school district, to whose benefit it enured. *Haines v. Readfield*, **XLI.** 246.

42. A collector's warrant, signed by two selectmen, is illegal. *Haines v. Readfield*, **XLI.** 246.

43. A town is not legally responsible for improper proceedings, willful or otherwise, by the majority of a school district. *Trim v. Charleston*, **XLI.** 504.

44. The provisions of R. S. of 1841, c. 14, § 88, are not applicable to school districts. *Trim v. Charleston*, **XLI.** 504.

## SCHOOL FUND.

See CORPORATION, 5, 27, 28. TRUSTEE.

## SCHOOL TEACHER.

1. A person who instructs a town school, without the statute certificate from the superintending school committee, cannot recover his wages against the town. *Jose v. Moulton*, **XXXVII.** 367.

2. And if, for the year in which such school is kept, no superintending school committee has been chosen, such omission of the town will not aid the plaintiff to recover. *Jose v. Moulton*, **XXXVII.** 367.

3. Nor can such teacher collect his wages from the agent who employed him, although the district itself might not have been originally legally established in all respects, or such agent might not have been sworn. *Jose v. Moulton*, **XXXVII.** 367.

See SCHOOLS.

## SCIRE FACIAS.

1. The remedy for an administrator *de bonis non*, upon an unsatisfied judgment, recovered by the original administrator, is, by *scire facias*. Debt will not lie. *Paine v. McIntire*, **XXXII.** 131.

2. It is a general rule, that no defence which he might have taken in the original suit is open to a defendant in *scire facias*. *Smith v. Eaton*, **XXXVI.** 298.

3. Where the obligee in a bond given by the testator has recovered judgment for its penalty and execution for such sum as was due, against the executor, within the four years from the time he accepted his trust, *scire facias* will not lie after four years, to obtain execution for subsequent installments. *Pettingill v. Patterson*, **XXXIX.** 498.

4. *Scire facias* can issue from no Court but the one having possession of the record upon which it is issued. *State v. Brown*, xli. 535.

5. It may properly be made returnable to a term of the court holden for the transaction of criminal business. *State v. Brown*, xli. 535.

6. A writ of *scire facias* on a recognizance, referring to no charge against the defendant, and containing no reference to any charge against him in any complaint or indictment, is bad, and insufficient to authorize proceeding to trial. *State v. Brown*, xli. 535.

7. A recognizance, conditioned that the defendant should appear in court "from day to day during the term," does not furnish a foundation for a writ of *scire facias*. *State v. Brown*, xli. 535.

8. A party cannot be required to come into court, actually in session, to answer "such matters and things as shall be objected against him," without any specific charge being alleged or set forth. *State v. Brown*, xli. 535.

See RECOGNIZANCE, 16, 24.

TRUSTEE PROCESS, 8, 9, 70.

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## SEAL AND SEALED INSTRUMENTS.

1. It is not necessary that a magistrate's warrant, issued upon a penal statute, should be under seal, unless the statute expressly require it. *State v. McNally*, xxxiv. 210.

2. The affixing of a seal, though it be not mentioned in the instrument, constitutes a deed. *Wing v. Chase*, xxxv. 260.

3. The sealing of a contract furnishes of itself sufficient evidence of a consideration. *Wing v. Chase*, xxxv. 260. *Augusta Bank v. Hamblet*, xxxv. 491.

4. A seal has the effect to overcome and control statements, expressly made in the contract itself, that there was no legal consideration. *Wing v. Chase*, xxxv. 260.

5. In a criminal prosecution, a warrant, issued by a magistrate, without a seal, is void. *State v. Drake*, xxxvi. 366.

6. Where a corporation makes a contract through an agent, who puts to it a seal, it becomes by law the deed of the corporation, though it is not their common seal. *Porter v. A. & K. R. R. Co.*, xxxvii. 349.

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## SEARCH WARRANT.

•See WARRANT.



## SEIZIN AND DISSEIZIN.

- I. WHAT IS A GOOD SEIZIN.
- II. DISSEIZIN.
- III. EVIDENCE.

## I. WHAT IS A GOOD SEIZIN.

1. A right of entry is made by statute a sufficient seizin upon which to maintain a writ of entry. *Sargent v. Roberts*, xxxiv. 135.

2. There cannot be two distinct and independent seizins of the same land at the same time. *Put. F. School v. Fisher*, xxxiv. 172.

See DOWER, 16, 17, 19, 20, 21, 22, 56, 58, 66.

EXECUTION, 87—89.

FLATS, 9, 10.

LANDLORD AND TENANT, 13.

## II. DISSEIZIN.

- (a) WHAT IS.
- (b) WHO MAY BE DISSEIZED.
- (c) RIGHTS OF THE DISSEIZOR AND DISSEIZEE.
- (d) EFFECT OF A DISSEIZIN.

(a) *What is.*

3. Disseizin, in order to defeat the operation of the proprietor's deed, must be by occupancy of a part, under a deed of conveyance recorded, or such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the disseizor's claim and occupation. *Foxcroft v. Barnes*, xxix. 128.

4. An occupation according to the provisions of Act of 1821, c. 62, § 6, or R. S. of 1841, c. 147, § 11, does not constitute such a disseizin as would prevent the owner from conveying his land, although, if continued twenty years, it might bar a writ of entry, brought by the owner for possession. *Foxcroft v. Barnes*, xxix. 128.

5. Persons, claiming under an officer's sale of an equity of redemption, do not hold by a seizin adverse to that of the debtor. *Abbott v. Sturtevant*, xxx. 40.

6. The enclosing of land by a fence, though erected beyond the true divisional line, is not a disseizin of the adjoining owner, if it was done through a mistake as to the true line, and if there was no claim to title beyond that line, and if the true owner has not been prevented from occupying his whole land. *Lincoln v. Edgecomb*, xxxi. 345.

7. A possession of land, open, notorious, adverse and exclusive, indicates a claim of right, and will constitute a disseizin, unless controlled or explained by other testimony. *Winthrop v. Benson*, xxxi. 381. *Chadbourn v. Swan*, xl. 260.

8. If one be seized of a tract of land, and another, claiming the same by a registered deed, enters upon a part thereof, his entry does not constitute a

disseizin of the whole, at his election, unless the part so entered upon be continued in his possession. *Robinson v. Brown*, xxxii. 578.

9. By an entry into land and a visible possession of a part of it, by one claiming the same under a registered deed, the true owner is constructively disseized of the whole tract described in the deed. *Put. F. School v. Fisher*, xxxiv. 172.

10. But such constructive disseizin would not extend to any part of the land, of which some other person was seized and possessed at the time. *Put. F. School v. Fisher*, xxxiv. 172.

11. An open, exclusive and adverse possession of a tract of land by a demandant is not established by proof that no other person than such demandant had occupied it for thirty years, and that he had cut wood upon it, and had always fenced portions of it. *Frye v. Gragg*, xxxv. 29.

12. Occupation of land by a demandant, in submission to the title of another, will not authorize him to assert a title by disseizin and possession. *Frye v. Gragg*, xxxv. 29. *Gray v. Hutchins*, xxxvi. 142.

13. Before the enactment of R. S. of 1841, a disseizin of the owner of land could only be effected by one holding it adversely to his title. *Gray v. Hutchins*, xxxvi. 142.

14. Without actual occupation of some portion of the premises by the grantee under a registered deed, the real owner is not disseized thereby. *Put. F. School v. Fisher*, xxxviii. 324.

15. To acquire a title by disseizin, the possession of the tenant or of those under whom he claims, must be proved to have been open, notorious, exclusive and adverse to the true owner for twenty years. *Chadbourne v. Swan*, xl. 260.

(b) *Who may be disseized, and of what.*

16. The owners of flats beyond one hundred rods, which are subject to the flux and re-flux of the tide, are liable to be disseized by an exclusive and adverse possession, which, continued for twenty years, divests the owner of his title. *Clancey v. Houdlette*, xxxix. 451.

17. Such rights as are a part of the State sovereignty, conferred for the public good, cannot be lost by disseizin. *Treat v. Lord*, xlii. 552. *Brown v. Black*, xliii. 443.

(c) *Rights of the disseizor and disseizee.*

18. A disseizor may surrender his possession to the disseizee, at any time before his disseizin has ripened into a title, and thus end his claim. *Winthrop v. Benson*, xxxi. 381.

19. When the title has been perfected, it cannot be conveyed by a parol abandonment or relinquishment. *Winthrop v. Benson*, xxxi. 381.

20. Under R. S. of 1841, c. 91, § 1, the title of a grantor to land will pass, though he may be disseized at the time of his conveyance, if he have a right of entry. *Put. F. School v. Fisher*, xxxiv. 172. *Pratt v. Pierce*, xxxvi. 448.

21. The owner of lands, in possession of another, before R. S. of 1841, might make an effectual conveyance of the land, when such possession was not adverse. *Gray v. Hutchins*, xxxvi. 142.

22. Prior to R. S. of 1841, a disseizee of land could make no valid conveyance. *Buck v. Babcock*, xxxvi. 491.

23. To a deed, made prior to the R. S. of 1841, by a disseizee, these statutes imparted no new efficiency. *Buck v. Babcock*, xxxvi. 491.

24. A possession open, notorious and exclusive, such as the character of flats will admit, showing a disseizin of the true owner, if less than twenty years, will authorize the disseizor to maintain trespass against a wrongdoer. *Clancey v. Houdlette*, xxxix. 451.

#### (d) *Effect of a disseizin.*

25. A disseizin continued twenty years, uncontrolled or unexplained, is as effectual to pass the title as a deed would be. *Winthrop v. Benson*, xxxi. 381. *Clancey v. Houdlette*, xxxix. 451. *Chadbourn v. Swan*, xl. 260.

26. The tenant, having entered under one who disseized the true owner, is not liable to the latter in an action for use and occupation, though he may have promised by parol to pay the rent, unless an entry has been made to purge the seizin. *Roxbury v. Huston*, xxxix. 312.

### III. EVIDENCE.

27. Where the tenant claims title by adverse possession, evidence how the land was run out and monuments established, when he entered upon it under a contract with the owner, is immaterial. *Gray v. Hutchins*, xxxvi. 142.

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### SERVICE.

See WRITS, &c. 9—13.

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### SET-OFF.

- I. WHAT CLAIMS MAY BE SET OFF, AND WHEN.
- II. HOW AND WHEN TO BE PRESENTED AND ALLOWED.
- III. SET-OFF OF JUDGMENTS AND EXECUTIONS.

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#### I. WHAT CLAIMS MAY BE SET OFF, AND WHEN.

1. Repairs made upon a vessel by the owner, after he became the purchaser, cannot be set off against her earnings prior to the purchase. *Richardson v. Kimball*, xxviii. 463.

2. A defendant cannot set off the plaintiff's demand, against a note indorsed to the defendant, unless the plaintiff had agreed with the defendant to pay him such note, or to receive it upon such demand. *Smith v. Ellis*, xxix. 422.

3. Where the plaintiff becomes non-suit, no judgment can be rendered against him upon an account in set-off. *Sewall v. Tarbox*, xxx. 27.

4. An account in set-off cannot be allowed, unless the clerk have noted thereon the day upon which it was received and filed. *Pond v. Niles*, xxxi. 131.

5. In a suit upon a witnessed note, an account, barred by the statute of limitations, but of about the same date with the note, and larger in its amount, cannot be sustained in set-off. *Nason v. McCulloch*, xxxi. 158.

6. A note for money, given by the plaintiff to the defendant, may be proved under an account filed in set-off, for money had and received. For that purpose, no amendment of the set-off claim is necessary, though it is allowable. *Gragg v. Frye*, xxxii. 283.

7. A debt, due to the defendant from the plaintiff jointly with others, cannot be set off. *Adams v. Ware*, xxxiii. 228.

8. Rights to a set-off, in a suit wherein an executor or administrator is a party, are the same that would have existed if all the parties interested had continued in life. *Adams v. Ware*, xxxiii. 228.

9. After the death, and insolvency of the estate, of the payee of a note given for land conveyed by a warranty deed, the title to which land had partially failed, the maker of the note, in a suit against him by the administrator, is entitled, under the insolvency laws, to set off the breach of the covenant against the note. *Morrison v. Jewell*, xxxiv. 146.

10. And that, too, although his claim may not have been filed before the commissioners of insolvency. *Morrison v. Jewell*, xxxiv. 146.

11. An indorsee who purchases the note with knowledge of the partial failure of its consideration takes it subject to the same right of set-off. *Morrison v. Jewell*, xxxiv. 146.

12. In a trustee process, co-partners, summoned as trustees, and indebted to the principal defendant, may set off a claim due from him to one of the co-partners. *Robinson v. Furbush*, xxxiv. 509.

13. For goods belonging to the defendant, but tortiously taken and detained by the plaintiff, an account filed in set-off by the defendant, to the plaintiff's demand, cannot be sustained. *Hopkins v. Meguire*, xxxv. 78.

14. In a suit by the indorsee against the maker of a note, a note given by the indorser to the defendant cannot be allowed in set-off, if not mentioned in the defendant's statement of his set-off demands. *Hopkins v. Meguire*, xxxv. 78.

15. Where plaintiff received \$10, in cash, and it was proved that the defendant paid an order drawn by plaintiff on W. for \$26, in favor of P., which order W. refused to accept; and the plaintiff afterwards, upon learning the fact of payment of the order by defendant, replied "that it was all right;" Held, that the above items were intended by the parties as payment *pro tanto*, and not as evidence of set-off. *Dodge v. Swazey*, xxxv. 535.

16. A claim in set-off, to be available, must be due and payable at the time of the commencement of the plaintiff's action. *Houghton v. Houghton*, xxxvii. 72.

17. But a mere liability as surety, existing at the time, but not discharged till after commencement of the plaintiff's action, cannot be allowed in set-off. *Houghton v. Houghton*, xxxvii. 72.

18. In a suit by the administrator of an insolvent estate, a note against

the intestate, held by the defendant as indorsee, may be allowed in set-off. Chapter 115 of R. S. of 1841, does not apply in such cases. *Ellis v. Smith*, xxxviii. 114.

19. To an action by an administrator of an insolvent estate, upon a judgment which had been assigned by the intestate for security to a creditor, any lawful claims against the intestate, which defendant had at the time of the intestate's death, may be allowed in set-off, after the debt for which the judgment was assigned has been first paid and the costs of the suit. And if the amount in set-off exceeds the balance due in the suit, the defendant is entitled to a judgment for the excess, and to have the same certified to the Probate Court as his claim against the estate. *Ellis v. Smith*, xxxviii. 114.

20. An account in set-off must be of such a character, that the record will protect the party against an action relating to the same matter. *Stevens v. Blen*, xxxix. 420.

21. Where defendant took back a horse he had sold to plaintiff, upon his saying that he would do what was right about it, or would leave it to a third person, and the plaintiff had in fact damaged the horse while thus owning it, in an action between them, such claim for use and damage is not a matter in set-off. *Stevens v. Blen*, xxxix. 420.

22. A charge for rent of real estate, where there is no contract as to the price, cannot be sustained in set-off. *Hall v. Glidden*, xxxix. 445.

23. A. purchased a lot of demands of B., and gave his notes therefor, with an agreement on his part to use all proper exertions to collect them without cost to B.; A. being at liberty to return the demands, with an account at the end of two years to B., who was to repay to A. the balance of purchase money not collected. In an action upon B.'s notes, against B.'s administrator: *Held*, that the administrator might sustain, in set-off, the claim for the uncollected balance of the demands. *Otis v. Adams*, xli. 258.

## II. HOW AND WHEN TO BE PRESENTED AND ALLOWED.

24. The defendant has a right at law, to withdraw an account which he may have filed in set-off, although the putting the set-off before the jury might prove the existence of mutual and open accounts between the parties, and though the withdrawal of it would expose the plaintiff's claim to the statute of limitations. *Theobald v. Colby*, xxxv. 179.

25. Where, in a suit upon several distinct indebtments, a set-off claim is allowed by the jury, the law presumes the amount to have been allowed ratably upon each of the indebtments. *Franklin Bank v. Cooper*, xxxvi. 221.

26. A surety upon one of such indebtments, has no right to claim that such set-off be applied, by priority, upon that particular indebtment. *Franklin Bank v. Cooper*, xxxvi. 221.

27. A defendant, living out of the State, upon whom service is made, after the entry of the action, may seasonably file his claim in set-off on the first day of the term next succeeding the service. *Otis v. Adams*, xli. 258.

## III. SET-OFF OF JUDGMENTS AND EXECUTIONS.

28. If the assignee of an account bring an action in the name of the assignor, for the whole amount of the account, and the defendant bring a cross

action, also, for the full amount of his account, and both actions proceed to judgment; under R. S. of 1841, c. 115, the judgment *debt* in the lesser claim, by leave of Court, may be set off *pro tanto* against the larger; but the costs of the lesser judgment cannot be set off in further payment of the balance of the larger judgment, without the consent of the assignee. *WELLS, J.*, dissenting. *Bartlett v. Pearson*, **XXIX.** 9.

29. The District Court may exercise a discretionary power by ordering or refusing to order judgments of the Court to be set off, when it can be done without a violation of the rights of either party. *Bartlett v. Pearson*, **XXIX.** 9.

30. Where judgments are recovered at the same term, one in favor of A. against B. and sureties, and the other in favor of B. against A., the Court, on motion of B., will set off the one against the other. *Prince v. Fuller*, **XXXIV.** 122.

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### SETTLEMENT.

See PAUPER.

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### SHERIFF.

1. The law, in many instances, recognizes sheriffs as officers of the Court, and establishes their compensation and that of their deputies, when in attendance at its sessions. *Baker v. Johnson*, **XLI.** 15.

2. There is, however, no statute, which, in terms, requires such attendance of the sheriff; and yet, so long and so universally has the custom prevailed for him thus to attend Court, that an omission to do so, without sufficient excuse, would be deemed an absolute dereliction of duty. *Baker v. Johnson*, **XLI.** 15.

3. The fees of the sheriff and other executive and ministerial officers in attendance, are taxed by the Court. *Baker v. Johnson*, **XLI.** 15.

4. The power of sheriffs and their deputies, to serve and execute precepts, is derived from the statute alone. *Benson v. Smith*, **XLII.** 414.

5. Prior to the Act of January 28, 1852, sheriffs and their deputies had no authority to seize and sell mortgaged property as a whole, when a part of it was in a county to which their authority did not extend. *Benson v. Smith*, **XLII.** 414.

## SHIPPING.

- I. TITLE.
- II. MASTER AND SEAMEN.
- III. RIGHTS AND LIABILITIES OF OWNERS.
- IV. BILLS OF LADING.
- V. CONSIGNMENTS.
- VI. FREIGHT, AND CHARTER PARTIES.
- VII. IN OTHER RESPECTS.

## I. TITLE.

1. The property in a vessel may be legally transferred without a bill of sale or other written evidence of it. *Richardson v. Kimball*, xxviii. 463. *Met-calf v. Taylor*, xxxvi. 28. *Chadbourn v. Duncan*, xxxvi. 89. *Rice v. McLarren*, xlii. 157.

2. But there must be proof of an agreement to sell and purchase, and of a valuable consideration also, when the title is asserted against creditors of the vendor. *Richardson v. Kimball*, xxviii. 463.

3. A delivery of a vessel, in port at the time of sale, is as necessary to perfect the title against creditors, as it is when any other description of personal property is sold. *Richardson v. Kimball*, xxviii. 463.

4. Upon the sale or transfer of a vessel from one person to another, the certificates of the registry or enrollment pass to the purchaser. *Barnes v. Taylor*, xxxi. 329.

5. They are of no further value to the seller, and, in trover against a third person in whose hands they may be found, he can recover nothing for them. *Barnes v. Taylor*, xxxi. 329. *Mitchell v. Taylor*, xxxii. 434.

6. The property of a vessel passes without the recital of the certificate of her registry or enrollment in the instrument of conveyance. *Mitchell v. Taylor*, xxxii. 434.

7. But, unless the instrument of conveyance contain such a recital, no new certificate of registry or enrollment can issue to the purchaser. *Mitchell v. Taylor*, xxxii. 434.

8. In the certificate of registry or enrollment, surrendered to the collector of customs, upon the sale of a vessel, the purchaser has no interest. And such papers are of no value to either party. *Mitchell v. Taylor*, xxxii. 434.

9. Enrollment at the custom house is evidence, though not conclusive, to show who is the owner and who is the master of the vessel. *Jordan v. Young*, xxxvii. 276.

10. The register of a vessel is not of itself evidence of title, except as it is confirmed by auxiliary circumstances, showing that it was made by the authority or assent of the one who is sought to be charged as owner. *Bradbury v. Johnson*, xli. 582.

11. Without such connecting proof, it is not even *prima facie* evidence to charge a person as owner; and is not conclusive, even with such proof. *Bradbury v. Johnson*, xli. 582.

12. The register is no evidence in favor of a person claiming as owner, and is not legally admissible for that purpose. *Bradbury v. Johnson*, xli. 582.

13. In an action against a person as owner of a vessel, the register, if the oath of ownership was made by himself, is treated as an admission, which may be given in evidence to charge him. *Aliter*, if the oath was made by another, without his assent. *Bradbury v. Johnson*, **XLI**. 582.

See MORTGAGE, 194, 195.

## II. MASTER AND SEAMEN.

- (a) OF THE DUTY AND AUTHORITY OF THE MASTER AS AGENT.
- (b) WAGES OF SEAMEN.
- (c) IN OTHER RESPECTS.

### (a) *Of the duty and authority of the master as agent.*

14. The master of a vessel is the general agent of the owner for certain purposes, but not for selling her, except in case of wreck or other extreme necessity. *Johnson v. Wingate*, **XXIX**. 404.

15. When a master of a vessel, in selling it under instructions, exceeds his authority, the principal is not bound. *Johnson v. Wingate*, **XXIX**. 404.

16. The master is agent of the owners only so long as he acts for them; and they can discharge him at any time, and put an end to his authority. *Jordan v. Young*, **XXXVII**. 276.

17. Where a voyage is broken up by ungovernable circumstances, the master, acting in good faith for all concerned, and under supreme necessity, is authorized to sell the ship and cargo. *Pike v. Balch*, **XXXVIII**. 302.

18. But the master acts for the owners or insurers only because they cannot act for themselves; and his acts will be valid to the extent of their extreme necessity. *Pike v. Balch*, **XXXVIII**. 302.

19. Before selling the cargo, if its situation will admit of it before it will probably be lost, he should communicate with the owners; and to effect such communication, he is bound to use any available means within his power. *Pike v. Balch*, **XXXVIII**. 302.

20. Masters are the general agents of the owners of a ship, so far as respects acts necessary to the successful prosecution of the voyage. *Duncan v. Reed*, **XXXIX**. 415.

21. In case of the loss of a vessel, the master is bound to dispose of the wreck to the best advantage of the owners, and his duties do not cease until the proceeds which may be saved are placed at their disposal. *Duncan v. Reed*, **XXXIX**. 415.

22. While so employed in their interests, he is entitled to reasonable compensation and necessary incidental expenses. *Duncan v. Reed*, **XXXIX**. 415.

23. Whether the master of a disabled vessel has authority to sell her, for the benefit of those concerned, is to be alone determined by the circumstances and condition of the vessel, at the time and place where the sale is made. *Prince v. Ocean Ins. Co.*, **XL**. 481.

24. When a survey is called upon a disabled vessel, it is presumed to be correct, but is not conclusive; it cannot control the rights of the parties, but is important evidence, designed generally to protect the rights of all concerned. *Prince v. Ocean Ins. Co.*, **XL**. 481.

25. Where the master, as such, sells his vessel on account of its injury, he must show that he proceeded correctly, and that the sale was justifiable. To



establish this, it must have arisen from necessity. *Prince v. Ocean Ins. Co.*, XL. 481.

26. A master, owning a part of the vessel thus sold, is justifiable under the same circumstances as if he were not a part owner. *Prince v. Ocean Ins. Co.*, XL. 481.

27. The authority of the master of a ship in a foreign port, is restricted to such repairs and supplies as are in a just sense necessary for the ship under the actual circumstances of the voyage; and a suit against the owner for their value cannot be maintained without proof that such repairs and supplies were necessary. GOODENOW, J., non-concurring. *Whitten v. Tisdale*, XLIII. 451.

See AGENCY, 4, 6.

(b) *Wages of seamen.*

28. A part owner of a vessel is not relieved from his joint liability for the wages of a seaman, who was employed on credit of the owners by the master, although the master was appointed by the other part owner, and although he forbade both the master and other part owner to employ the vessel at all, unless such prohibition was known to the seaman. *Hardy v. Sprowl*, XXIX. 258.

29. The hirer of a vessel on shares, while using and controlling her under the contract, is to be considered the owner, acting for himself in procuring seamen and supplies. *Giles v. Vigoreux*, XXXV. 300.

30. The enrollment or registry of a vessel is not conclusive evidence against the general owner, in a suit against him for sailors' wages. *Giles v. Vigoreux*, XXXV. 300.

31. No promise, upon which a sailor can maintain a suit for wages, is deductible from his right to collect them by process *in rem*. *Giles v. Vigoreux*, XXXV. 300.

32. Against the general owner of a vessel, chartered on shares, no action for wages can be maintained by a seaman, who was employed by the hirer, while using and controlling the vessel under the charter party. *Giles v. Vigoreux*, XXXV. 300.

33. Where the contract is for a general voyage, with no limitation, except as to time, it will be construed as a contract for service for the time named in the articles, to be employed between such ports as the master may elect. *Noble v. Steele*, XLII. 518.

34. Under such contract, if a seaman, without adequate cause, leave the vessel before the expiration of the time specified, he will forfeit his wages earned prior to the desertion. *Noble v. Steele*, XLII. 518.

(c) *In other respects.*

35. Where, through absolute necessity, a vessel has anchored upon a common and known passage-way to a wharf, it is the master's duty to exercise reasonable skill, prudence and care, to give all others their just rights of navigating the river. *Knowlton v. Sanford*, XXXII. 148.

36. No vindictive damages were intended to be given to the father of a person under twenty-one years of age, by R. S. of 1841, c. 154, § 23; but

the measure of damages is compensation for the pecuniary injury or loss resulting from such transportation. *Nickerson v. Harriman*, xxxviii. 277.

37. If the minor, who is transported, dies at the termination of the outward voyage, no damages can be recovered by his father, of the master, for the loss of the son's services, after his death. *Nickerson v. Harriman*, xxxviii. 277.

38. Where a voyage is broken up by shipwreck, the wages of the master terminate when the vessel and cargo pass out of his control. *McGilvery v. Stackpole*, xxxviii. 283. *Duncan v. Reed*, xxxix. 415.

39. For any subsequent services and expenses in securing and transmitting the funds belonging to the owners, he is entitled, as agent, to reasonable compensation and necessary incidental expenses; but such services must be in the implied employment of the owners, and not merely for himself. *McGilvery v. Stackpole*, xxxviii. 283.

40. For expenses and board, and medical services in his behalf, the owners are liable. Nor can they refuse the allowance of expenses which have been included in the general average, and of which they have received the benefit. *Duncan v. Reed*, xxxix. 415.

41. But, for errors committed by the master, through his own fault only, the owners are not responsible to him. *Duncan v. Reed*, xxxix. 415.

### III. RIGHTS AND LIABILITIES OF OWNERS.

(a) FOR SUPPLIES AND REPAIRS.

(b) IN OTHER RESPECTS, AND IN GENERAL.

#### (a) *For supplies and repairs.*

42. One part owner of a ship cannot recover of the other any portion of the expense for repairs in a home port, without any authority from, or knowledge and consent of, such other. *Benson v. Thompson*, xxvii. 470. *Hardy v. Sprowl*, xxxi. 71.

43. In a suit for a share of the supplies furnished to a vessel, of which the plaintiff and defendant were part owners, an admission by the defendant, (after having alienated his part,) that the claim was justly due, in the absence of proof or pretence of other outstanding bills, is an admission, that, upon a final adjustment of all liabilities by the joint owners, such balance was due the plaintiff, and upon such admission the suit is maintainable. *McLellan v. Longfellow*, xxxiv. 552.

44. If a vessel be let on hire to be used and sailed without charge for repair or other expense to the owner, he will not be liable for supplies and outfits procured by the hirer. And this, too, whether the contract be or be not known to the party furnishing the articles; and whether the person letting the vessel be owner of the whole or of an undivided part. *McLellan v. Reed*, xxxv. 172. *Swanton v. Reed*, xxxv. 176.

45. Neither will he be liable for materials used in the repair of a vessel, though the contract for such letting be by parol, and though it be unknown to the material man, and though the repair be of a permanent character. *Swanton v. Reed*, xxxv. 176.

46. The master of a vessel, merely as such, has no authority to order repairs in the home port. And a vessel, moored at the wharf, in a town adjoining that in which the owner resides, is at her home port. *Jordan v. Young*, xxxvii. 276.

47. The owners of a vessel are not liable for repairs, unless they were made by their order, or by the direction of some one who has a right to act for them. *Jordan v. Young*, xxxvii. 276.

48. Where the owner of a vessel contracted, in writing, to sell and convey her to certain persons, upon the payment of a sum stipulated, and, thereupon, ceased to exercise any control over her, in the appointment of a master, or in directing her employment, and did not receive her earnings; he is not liable for money advanced on the request of the master, to pay for necessary repairs. *Tyler v. Holmes*, xxxviii. 258. *Nash v. Parker*, xxxviii. 489.

(b) *In other respects, and in general.*

49. Confession, made by the owner, upon record in the U. S. Courts, that the vessel has been forfeited for a breach of the navigation laws, is not conclusive against him; for it may have been made under a mistake of the facts or of the law. *Mitchell v. Cunningham*, xxix. 376.

50. After seizure of a vessel and cargo, for such supposed breach of the law, and after such confession, and while the property is in the custody of the law under the seizure, the owner still has such an interest as would enable him to make a valid mortgage to some of his creditors, as against others, who should attach after final restoration by the government. *Mitchell v. Cunningham*, xxix. 376.

51. One of four owners of a vessel cannot maintain an action of assumpsit for the use and charter of it, against the other three jointly. *Sturdivant v. Smith*, xxix. 387.

52. While, between the joint owners of a vessel, no settlement has been made of her disbursements and earnings, and no balances have been agreed upon, one part owner cannot sustain an action against another for his proportion of the net avails, although the vessel has been lost at sea. The usual process for such adjustment is at equity. *Maguire v. Pingree*, xxx. 508. *Hardy v. Sproul*, xxxiii. 508. *Dodge v. Hooper*, xxxv. 536.

53. Even if, without necessity, a vessel have anchored in a common and known passage way to a wharf, that would not excuse neglect in any other vessel, attempting to pass upon such passage way. Such vessel is bound to the use of ordinary care and skill. If, through want of such care and skill, on the part of the vessel attempting to pass, a collision should occur, her owners would be liable to the owners or shippers of the anchored vessel, for their damages. *Knowlton v. Sanford*, xxxii. 148.

54. Owners of vessels are responsible for the negligence and want of skill of masters, while acting within the sphere of their employment. *Knowlton v. Sanford*, xxxii. 148.

55. No action can be maintained by one part owner against another, relative to her earnings and disbursements, even after the defendant sold his part of the vessel; and even though, while part owner, he had control of the vessel, sailing her on shares. *Dodge v. Hooper*, xxxv. 536.

56. One who charters a vessel is not thereby authorized to insure for the owner. Neither has one part owner, as such, a right to insure for another. *Sawyer v. Freeman*, xxxv. 542. *Chadbourn v. Duncan*, xxxvi. 89.

57. If, between part owners, the respective claims growing out of her employment have been liquidated, the balance due either may be recovered by an action at law. *Chadbourn v. Duncan*, xxxvi. 89.

58. Persons, severally owning distinct fractional parts of a vessel, are merely tenants in common; and a declaration by one will not bind another. *McLellan v. Cox*, xxxvi. 95.

#### IV. BILLS OF LADING.

59. Bills of lading are transferrable by indorsement; and when thus transferred by the consignee, to a *bona fide* purchaser, without notice of adverse claims, they pass the legal title. *Winslow v. Norton*, xxix. 419.

60. Where no laches are imputable to the indorsee, in taking possession of the property as soon as its arrival from sea, the sale to him cannot be defeated. *Winslow v. Norton*, xxix. 419.

61. A bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and also a promise to transport and deliver the same. *O'Brien v. Gilchrist*, xxxiv. 554.

62. So far as such a bill is a receipt, it may be controlled by parol proof, in a suit between the parties to it. As that the quantity of goods received was less than that acknowledged in the bill. *O'Brien v. Gilchrist*, xxxiv. 554.

63. Where a bill stated a specified number of sticks of timber, containing a specified number of tons "more or less," in a suit upon the bill, the defendant was not allowed to prove, by parol, an agreement by the shipper that the words "more or less" should apply equally to the number of sticks as to the number of tons. *O'Brien v. Gilchrist*, xxxiv. 554.

#### V CONSIGNMENTS.

64. When goods on shipboard are consigned to the captain for sale, his power to sell at the port of destination is not revoked by a sale made while the goods are at sea, and of which he had received no notice. The purchaser, in such case, adopts the captain as his consignee, until he appoints another. *Smith v. Davenport*, xxxiv. 520.

65. If the goods, thus sold, were by the contract of sale to be delivered to the purchaser on their arrival, and he have no one there to receive them, the captain, when unlading them, is the agent of the seller in delivering, and of the purchaser in receiving them. *Smith v. Davenport*, xxxiv. 520.

66. The consignee, or the party receiving the goods, is, in all cases, responsible for the freight. *Hill v. Leadbetter*, xlii. 572.

67. A. contracted to transport certain goods for B., which he delivered accordingly, save a portion, which he converted to his own use on the route; and for these, B. brought his action, and A. suffered a default therein. A. then sued B. for his freight, and B. made no claim to recoup the damages so sustained:—*Held*, that the freight was earned, and no deduction having been claimed, the plaintiff was entitled to judgment for the agreed price. *Hill v. Leadbetter*, xlii. 572.

See BAILMENT, 7.

## VI. FREIGHT, AND CHARTER PARTIES.

68. One who charters a vessel is not thereby authorized to insure her for the owner. *Sawyer v. Freeman*, xxxv. 542.

69. An authority in the master of a vessel, to receive a partial payment in advance for the freight, may be inferred from subsequent payments to him on that account, with the approbation of the owner. *Drummond v. Winslow*, xxxviii. 208.

70. And money thus found in the hands of the owner, belonging of right to the charterer, may be recovered in an action for money had and received. *Drummond v. Winslow*, xxxviii. 208.

71. Where the master sails the vessel on shares, but it does not appear that he had control over her, the owners may recover for her freight, in their own name. *Sims v. Howard*, xl. 276.

See SHIPPING, 66, 67.

## VII. IN OTHER RESPECTS.

72. If, in a river, there be a common and known passage way for vessels to a wharf, there is, ordinarily, no right in any person to anchor a vessel upon it, or so near it as to expose another vessel to danger, by compelling her to depart from the passage way. *Knowlton v. Sanford*, xxxii. 148.

73. In case of absolute necessity, however, a vessel may anchor upon such passage way, remaining no longer than the necessity exists. *Knowlton v. Sanford*, xxxii. 148.

74. Where a steamer, by user, has acquired the right to pass upon a particular passage way to a wharf, it is for the jury to decide whether other navigators are bound, under the circumstances, to know that there is such a passage way, and where it is. *Knowlton v. Sanford*, xxxii. 148.

## SKILL, PROFESSIONAL.

1. It is not a rule of law that a more skillful and learned person is entitled to a greater compensation, for the performance of a professional service, than one competent, but less skillful and learned, who should perform the service as well. *Stockbridge v. Crooker*, xxxiv. 349.

2. In awarding a reasonable compensation for a professional service, the jury may take into consideration the degree of skill exhibited, and of responsibility incurred, in its performance; but are not bound to award a sum "commensurate" with such skill and responsibility. *Stockbridge v. Crooker*, xxxiv. 349.

## SOMERSET AND KENNEBEC RAILROAD COMPANY.

The reservations in the fourteenth section of the charter of this company are remedial only, and contain no power to change an absolute grant to a conditional one. Nor is the requirement of erecting and maintaining fences, a condition upon which the rights granted by their charter were made to depend. *Nichols v. S. & K. R. R. Co.*, XLIII. 356.

## SPECIFICATIONS OF DEFENCE.

See PLEADING.

## STATUTES.

- I. CONSTRUCTION.
- II. WHAT ARE PUBLIC STATUTES.
- III. REPEAL AND REVIVOR.
- IV. GENERALLY.

## I. CONSTRUCTION.

1. Where a statute has received a judicial construction, and is afterwards reenacted in the same terms, it is to be understood that the Legislature have adopted the construction given it. *Myrick v. Hasey*, XXVII. 9.

2. No statute is to be held retrospective, or in violation of any constitutional provisions, where it affects rights, unless such shall be the necessary construction. *Given v. Marr*, XXVII. 212.

3. The Act of 1829, c. 440, permitting divorces to be decreed for desertion, &c., is not retrospective. *Given v. Marr*, XXVII. 212.

4. Courts of justice can give effect to Legislative enactments, only to the extent to which they may be made to operate by a fair and liberal construction. *Swift v. Luce*, XXVII. 285.

5. A charter, authorizing the erection of a toll-bridge, required it to be at least twenty-four feet wide, with sufficient rails on each side. It was constructed twenty-four feet wide between the rails, but with a central framework, the thickness of which, if deducted from the width of the bridge, left the traveling pathway less than twenty-four feet:—*Held*, that that reduction in the width of the pathway did not impair the right to receive toll. *Dam. T. Bridge v. Cotter*, XXXI. 357.

6. If a statute, which confers a special privilege, also imposes specified duties, and provides a remedy for the neglect of them, that remedy alone must be pursued. *Bassett v. Carleton*, XXXII. 553.

7. In the charter of a private corporation, the Legislature may establish a new tribunal, with exclusive power to decide whether the corporation shall have failed to perform its charter duties. *Bassett v. Carleton*, XXXII. 553.

8. In a charter authorizing the erection of a dam, subject to the duty of turning logs over the dam, and of supplying water for the driving of them, the selectmen of the town may rightfully be constituted the exclusive judges, (in controversies between the corporation and other parties,) to decide whether a sufficiency of water had been furnished, and whether the logs were seasonably turned over. *Bassett v. Carleton*, xxxii. 553.

9. In such controversies, testimony that the logs were not seasonably turned over, and that the supply of water was insufficient, cannot be received in a court of law, even though the selectmen were never called, by either party, to act upon the subject. *Bassett v. Carleton*, xxxii. 553.

10. The expiring of the time allowed by an Act for finishing the proceedings invalidates them, if unfinished, at whatever stage they had arrived. *Williams v. Lincoln Co. Com.*, xxxv. 345.

11. Chapter 148, § 49, of R. S. of 1841, is a remedial and not a penal enactment. *Frohock v. Pattee*, xxxviii. 103. *Thatcher v. Jones*, xxxi. 528.

12. Chapter 98, of the Act of 1854, is prospective in its operation. *Ellis v. Smith*, xxxviii. 114.

13. An Act should not be construed as authorizing any unnecessary infringement of existing privileges and rights. *State v. Freeport*, xliii. 198.

See ACTION, 71, 78, 85.

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## II. WHAT ARE PUBLIC STATUTES.

14. Each chapter of the Revised Statutes is itself a statute. *Cleaves v. Jordan*, xxxv. 429.

15. Acts prescribing the limits of towns and counties are public Acts, of which the Court are bound to take notice. *State v. Jackson*, xxxix. 291.

## III. REPEAL AND REVIVOR.

16. An unqualified repeal of a penal statute extinguishes all pending suits founded upon it; and no costs are recoverable by either party. *Saco v. Gurney*, xxxiv. 14. *Heald v. State*, xxxvi. 62.

17. The repeal of an Act which authorized a course of proceedings by a public officer invalidates the proceedings, if unfinished, at whatever stage they had arrived. *Williams v. Lincoln Co. Comm'rs*, xxxv. 345.

18. A repeal of a penal statute precludes the rendition of a judgment, although a *nolo contendere* had been pleaded prior to the repeal. *Heald v. State*, xxxvi. 62.

19. An action properly commenced under the Act of 1850, c. 196, § 7, and pending at the time of the enactment of the Act of 1853, c. 29, is maintainable, notwithstanding the said 7th section was repealed by the Act of 1852, c. 284. *Rice, J.*, dissenting. *Plantation No. 9 v. Bean*, xxxvi. 359.

20. An action, commenced by authority merely of a statute, cannot be maintained, if, at the time it comes on for trial, the statute has been repealed, without any saving clause. *Macnawhoc Plantation v. Thompson*, xxxvi. 365.

21. In deciding a question at the trial of an action, reference can only be had to the law as then existing; and no subsequent Act can have any effect upon its determination. *Macnawhoc Plantation v. Thompson*, xxxvi. 365.



22. When a statute is revised and parts are omitted in the revision, those provisions are not to be revived by construction. *Pingree v. Snell*, XLII. 53.

23. Provisions of a statute, absolutely inconsistent with those of another statute subsequently enacted, are ordinarily regarded as repealed; but statutes cannot be repealed by implication, if the implication does not necessarily follow from the language used. *Pratt v. At. & St. L. R. R. Co.*, XLII. 579.

24. The simple incorporation, into a private statute, of a portion of the provisions of a general public statute, cannot be treated as a repeal of its other provisions which are omitted therefrom; nor can such omission exonerate the corporation from the duties, liabilities and obligations imposed upon similar corporations by the general statute. *Pratt v. At. & St. L. R. R. Co.*, XLII. 579.

25. The Act of 1842, c. 9, is remedial in its nature, and applies to corporations which obtained their charters prior to its enactment. *Pratt v. At. & St. L. R. R. Co.*, XLII. 579.

#### IV. GENERALLY.

26. R. S. of 1841, c. 1, § 1, providing when statutes shall take effect, applies to private as well as public statutes. *Cooper v. Curtis*, XXX. 488.

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### STOCKHOLDERS.

See CORPORATION, 23, 24, 43, 44, 59, 64, 70, 71, 78, 79, 80, 82, 83, 84, 85.

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### STOLEN PROPERTY.

See FRAUDULENT SALES OF PERSONAL PROPERTY, 44.

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### STREETS.

1. In the assessment of damage done to an individual by the establishment of a city street, requiring a removal of his building, a provision that he should not be required to move it, until necessary for the opening of the street, requires no special notice to him of the time for the removal. But that time would be sufficiently indicated to him by the progress made in the formation of the street. *Mussey v. Cahoon*, XXXIV. 74.

2. The proper width of a street must depend upon the amount of travel passing over it, upon the business transacted in it, and upon the comfort of those residing or doing business upon it. *Baldwin v. Bangor*, XXXVI. 518.

3. With a view to such uses, the authorities may rightfully locate streets

in different parts of the city, varying much in their widths and consequent accommodations. *Baldwin v. Bangor*, xxxvi. 518.

4. The Act of 1845, c. 256, does not apply to the establishment of public streets. *Baldwin v. Bangor*, xxxvi. 518.

See DEED, 115, 119, 122, 123.

WAYS, 83.

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### SUNDAY.

See LORD'S DAY.

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### SUPERCARGO.

See AGENCY, 7.

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### SUPERINTENDING SCHOOL COMMITTEE.

1. The parent of a child expelled from a public school, by order of the superintending school committee, can maintain no action against them for such expulsion. *Donahoe v. Richards*, xxxviii. 376.

2. The duties of such committee, as to the expulsion of scholars from a public school, partake of a judicial character; and, for an honest, though erroneous discharge of them, they are not liable in damages to the person expelled. *Donahoe v. Richards*, xxxviii. 379.

3. Such committee may rightfully enforce obedience to all the regulations by them made, within the sphere of their authority; and for a refusal to read from a book by them prescribed, they may expel such disobedient scholar. *Donahoe v. Richards*, xxxviii. 379.

4. No scholar can evade such requirement of the committee, under the plea that his conscience will not allow the reading of such book; nor because the church, of which the scholar is a member, hold, and have so instructed its members, that it is a sin to read the book prescribed. *Donahoe v. Richards*, xxxviii. 379.

See SCHOOLS.

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### SUPREME JUDICIAL COURT.

1. The Supreme Judicial Court, by the Act of 1852, c. 241, while sitting as a law court, is not a court of original jurisdiction. *Baker v. Johnson*, xli. 15.

2. This court is clothed with plenary power to maintain order and decorum while in session; and may employ, for this purpose, such subordinate ministerial and executive officers as may be deemed necessary. *Baker v. Johnson*, **XLI**. 15.

3. The Governor, with the advice of the Council, on the address of both branches of the Legislature, having removed from office one of the Justices of this Court, it is the imperative duty of the Court, the question being legally presented, not only to consider the proceedings preliminary to the address, and to decide upon their validity, but also to pass upon the question, whether such removal was in conformity with the constitution, and has the effect to disqualify such Justice, and to deprive him of the right to receive the compensation established by law. *Davis, ex parte*, **XLI**. 38.

4. The right and the duty of this Court to consider and decide questions regularly presented at its bar are inseparable. *Davis, ex parte*, **XLI**. 38.

5. Whenever, if ever, the executive or the legislative department exercises, in any respect, a power not conferred by the constitution, the judiciary, on a proper submission of the questions arising therefrom, is not only permitted, but compelled to sit in judgment upon such acts, and to pronounce them valid or otherwise. *Davis, ex parte*, **XLI**. 38.

. See COUNTY COMMISSIONERS, 55, 56.

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## SURETY.

- I. LIABILITY.
- II. WHEN DISCHARGED.
- III. REMEDIES.

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### I. LIABILITY.

1. It is a fair presumption, that one, becoming a surety, does it upon a belief that the principal parties are conducting in the usual course of business, subjecting him only to the ordinary risks attending it. *Franklin Bank v. Cooper*, **XXXVI**. 179.

2. To accept a surety, known to be acting upon a belief that there are no unusual circumstances by which his risk will be materially increased, while the party, thus accepting, knows that there are such circumstances, and withholds the knowledge of them from the surety, though having a suitable opportunity to communicate them, is a legal fraud, which discharges the surety. *Franklin Bank v. Cooper*, **XXXVI**. 179. *Franklin Bank v. Cooper*, **XXXIX**. 542.

3. The bond of a bank cashier, framed to cover past as well as future delinquencies, will be invalid against a surety, if his name was procured at the desire of the directors, they knowing that past defalcations existed, of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it. *Franklin Bank v. Cooper*, **XXXVI**. 179.

4. A surety cannot be discharged on the ground of fraudulent representa-

tions made to his principal, except when the principal would be. *Bryant v. Crosby*, xxxvi. 562.

5. A concealment, which entirely discharges a surety, is one of facts known to the other party, and not known to him; and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, having a suitable opportunity to make them known to the surety. *Bryant v. Crosby*, xxxvi. 562.

6. After chattels have been delivered by the principal in part payment of his note, he may adjust their value with the payee; and his written admission upon the contract of the amount due will bind his surety, in the absence of fraud. *Bryant v. Crosby*, xxxvi. 562.

7. Upon a note payable to a bank or order, which was never discounted or negotiated by the bank, but which was sold by the principal to a third person, no action can be maintained by the holder against the surety thereon, although the suit is in the name of the bank by authority. *Manufacturers' Bank v. Cole*, xxxix. 188.

8. If, in a contract of suretyship, there is any misrepresentation or concealment as to any material part of the transaction to induce the surety to become a party, it is void. But, to be material, it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. *Franklin Bank v. Stevens*, xxxix. 532.

9. Thus, in regard to a cashier's bond, conditioned that he should account for the money and property which had come into his hands as such cashier, prior, as well as subsequent to the date of the bond, the knowledge of the agents of the bank, that the books of the bank had been badly kept; that bonds had not been given in previous years; that the Bank Commissioners had omitted to perform their duties; that the directors had been negligent; and the concealment of these facts from the surety, are not material to the risk assumed, and will not relieve him from liability; but a knowledge by such agents of the bank, that, at the time of taking such bond, the cashier was a defaulter, and a concealment thereof from the surety, will avoid the bond. *Franklin Bank v. Stevens*, xxxix. 532.

10. A surety cannot interpose as a defence, that the name of another surety upon the same instrument was obtained by fraud, unless the signature of the latter was a condition by which to obtain that of the former. *Franklin Bank v. Stevens*, xxxix. 532.

10. A creditor, holding a demand against a principal debtor and surety, may attach the property of either. He is not bound to resort to the debtor's property first, in order to collect the debt. *Fuller v. Loring*, xlii. 481.

11. A recovered judgment against B. and C., principal and surety upon a note. By the direction of A.'s attorney, an officer seized and advertised for sale, by virtue of the execution, certain property of B. Afterwards, another officer, in another county, by direction of A.'s attorney, seized and sold, on the same execution, certain property of the surety C. Subsequently to this, the said property of B. was sold as advertised. C. then brought his action of trespass against A., claiming that the seizure and advertisement of B.'s property, followed by its sale on the execution, protected his own, B.'s property having been shown to be ample to satisfy the execution:—*Held*, that the property of C. was legally sold, and that he could not maintain his action against A. TENNEY, C. J., dissenting. *Fuller v. Loring*, xlii. 481. *Vide SURETY*, 14, 15.

12. If the principal sells the note to a third person, not the payee, without the express or implied consent of the sureties, they are not liable. *Granite Bank v. Ellis*, XLIII. 367.

13. Whatever will discharge a surety, in equity, will be a good defence in law. *Springer v. Toothaker*, XLIII. 381.

14. A creditor who holds the personal contract of his debtor, with a surety, and has, or receives subsequently, property from the principal as security for his debt, must appropriate it fairly for the payment of the debt, or he will lose his claim against the surety to the amount of the property. *Springer v. Toothaker*, XLIII. 381.

15. In a suit against the principal upon a promissory note, where property is attached, the plaintiff has no equitable or legal right to surrender or abandon it to the injury of the surety without his consent. *Springer v. Toothaker*, XLIII. 381. *Vide SURETY*, 11.

See ACTION, 46, 47.  
BANKRUPTCY, 11.

BILLS, &c., 45, 115, 164.  
EXECUTORS, &c., 79.

## II. WHEN DISCHARGED.

16. Where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged. *Mariners' Bank v. Abbott*, XXVIII. 280. *Lime Rock Bank v. Mallett*, XXXIV. 547. *Chute v. Pattee*, XXXVII. 102. *Lime Rock Bank v. Mallett*, XLII. 349. *Dunn v. Spaulding*, XLIII. 336.

17. The mere receipt of interest for a stipulated time, after the note has become payable, is not sufficient evidence of an agreement to give further credit. *Mariners' Bank v. Abbott*, XXVIII. 280.

18. Such a contract, between the holder of a note and the principal thereon, as would discharge the surety, if made prior to the pay-day, would have the same effect, though made subsequently to the pay-day. *Stowell v. Goodnow*, XXXI. 538.

19. Where the holder, in such case, relies upon the assent given to such contract by the surety, the *onus probandi* is upon the holder. *Stowell v. Goodnow*, XXXI. 538.

20. The surety in a debtor's relief bond is discharged, if, without his consent, the obligee, for a valuable consideration, extend the time for the principal to disclose, beyond the six months prescribed in the bond. *Phillips v. Rounds*, XXXIII. 357.

21. A consent by the principal, at the request of the creditor or his attorney, to delay the making of his disclosure, is a valuable consideration. *Phillips v. Rounds*, XXXIII. 357.

22. So, a contract between the creditor and principal in such bond, for a valuable consideration, without the knowledge of the surety, that the bond should be discharged, if the principal, at a time beyond six months, shall pay a specified part of the amount due, will discharge the surety. *Thomas v. Dow*, XXXIII. 390.

23. When the holder of a note has extended the time of payment, without the knowledge of the surety, the surety's defence will not be defeated by proof of an earlier contract of the same kind, made with the consent of the surety. *Lime Rock Bank v. Mallett*, XXXIV. 547.

24. The receiving of interest in advance is a valuable consideration for enlarging the time of payment. *Lime Rock Bank v. Mallett*, xxxiv. 547. *Chute v. Pattee*, xxxvii. 102. *Lime Rock Bank v. Mallett*, xlii. 349.

25. Upon such a note, the holder had made several successive indorsements of the words "Received, Renewed," to each of which was prefixed a date subsequent to the pay-day of the note:—*Held*, that each indorsement was equivalent to the words "Received the interest for a renewal." And, that the word "Renewed," might be regarded as an agreement to consider the note to be the same, as if made in the same terms, anew from that date. *Lime Rock Bank v. Mallett*, xxxiv. 547.

26. A person, whose name appears as maker upon a note, but who is in fact a surety only, and is known to be such by the payee, may avail himself of the defence that the time of payment has been enlarged without his knowledge or consent; even if the payee be a bank, whose rule and usage, well known to the surety, were to take no accommodation notes, so written, but, that it required all notes to be joint and several, and regarded all the promisors as principals, so far as the bank was concerned. *Lime Rock Bank v. Mallett*, xlii. 349.

27. The part payment of a note, by the surety, after his liability is thus terminated, with money belonging to his principal, will not revive his liability for the balance, although, at the time of such payment, he gave no intimation that the money was not his own. And he must show that the money thus paid belonged to the principal. *Lime Rock Bank v. Mallett*, xlii. 349.

See SURETY, 11, 14, 15.

### III. REMEDIES.

28. The liability of the principal in a promissory note, to reimburse his surety for any payment made by the latter, in consequence of his suretyship, commences when the note is delivered to the payee; and, whenever payment may be made by the surety, he is considered a creditor of his principal, from the time the note was delivered. *Sargent v. Salmond*, xxvii. 539.

29. In a suit to recover money paid by the plaintiff, as surety to the defendant in a replevin bond, it is no defence that the plaintiff, when he signed the bond, knew that the replevin suit was groundless and malicious. *Smith v. Rines*, xxxii. 177.

30. If the maker assents to the alteration of his note by the substitution of another surety, who pays the note, the former is liable to reimburse him. *Powers v. Nash*, xxxvii. 322.

31. And such assent may be presumed from his subsequent acts in relation to it, though he was not present when the substitution was made. *Powers v. Nash*, xxxvii. 322.

32. Whether the defendant would not be liable, after having received the benefit of plaintiff's name and having been relieved of his obligations, even without his assent, *quere*. *Powers v. Nash*, xxxvii. 322.

33. From the equitable obligation between the principal and surety, the legal liability arises that the surety shall be saved harmless; and a promise is implied from their relations, where none in fact existed. *Powers v. Nash*, xxxvii. 322.

See ASSUMPSIT, 9.

## SURGEON.

A surgeon is only liable for the want of ordinary skill, and for the want of ordinary care and judgment. *Howard v. Grover*, xxviii. 97.

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## SURVEY, AND SURVEYOR OF LUMBER.

1. A surveyor of lumber is not bound to keep a record of his surveys. His minutes are not of themselves evidence. *Ayer v. Sawyer*, xxxii. 163.

2. R. S. of 1841, c. 66, requiring staves to be surveyed, &c., does not apply to pine staves made for fish barrels, but only to certain descriptions of oak staves. Hence, an action may be maintained for the price of such pine staves sold to the defendant, though not culled or surveyed. *Gilman v. Perkins*, xxxii. 320.

3. Under a defence that lumber sold and delivered was not legally surveyed, in a suit to recover the price of it, the *onus* is upon the defendant. *Nutter v. Bailey*, xxxii. 504.

4. If the seller have authorized the purchaser to select a surveyor, the presumption is, that a surveyor was intended by whom the survey could legally be made. *Nutter v. Bailey*, xxxii. 504.

See CONTRACT, 29, 60.

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## SURVIVING PARTNER.

See EXECUTOR, 17—21.

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## SWINE.

The statute subjects the owner to a penalty, whose swine are found going at large without a keeper, on the highways or town ways. *Cleaves v. Jordan*, xxxiv. 9.

## TAX.

- I. ASSESSMENT.
- II. ABATEMENT.
- III. SALES OF LAND FOR TAXES.
- IV. REMEDY FOR ILLEGAL ASSESSMENT.
- V. REDEMPTION AND FORFEITURE.
- VI. EVIDENCE.

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I. ASSESSMENT.

- (a) UPON WHAT ASSESSMENT MAY BE MADE.
- (b) WHERE, AND TO WHOM, PROPERTY IS TO BE ASSESSED.
- (c) MAKING ASSESSMENTS.

(a) *Upon what assessments may be made.*

1. The Act, incorporating the Cumberland Marine Railway, authorized the company to hold personal and real estate, and required that the whole property should be divided into shares, and that such shares should be considered in all respects as personal estate:—*Held*, that under R. S. of 1841, c. 14, § 51, and Act of 1845, c. 159, § 10, the real estate belonging to the company is liable, as such, to taxation. *Cumb. M. Railway v. Portland*, xxxvii. 444.

(b) *Where, and to whom, property is to be assessed.*

2. The hiring of logs to be sawed does not constitute the owner of them, if non-resident, such an "occupant" of the saw-mill, as to subject the logs to taxation in the town wherein the mill is situated. *Campbell v. Machias*, xxxiii. 419.

3. Neither does the payment by him of wharfage for manufactured lumber constitute him such an "occupant" of the wharf, as to subject the lumber to taxation in the town wherein the wharf is situated. *Campbell v. Machias*, xxxiii. 419.

4. A town or city tax cannot lawfully be assessed to the mortgagee of land, who is not in possession, and who has never entered to foreclose. *Coombs v. Warren*, xxxiv. 89.

5. The capital stock of a bank can only be assessed once, and that upon the stockholders, to the value of their shares. *Augusta Bank v. Augusta*, xxxvi. 255.

6. But property composing no part of its capital, so held by a bank, that no other person or corporation could be legally taxed for it, as owner, is liable to be assessed to such bank. *Augusta Bank v. Augusta*, xxxvi. 255.

7. Thus, shares of a railroad corporation, which it may hold by an absolute title, may rightfully be assessed to the bank. *Augusta Bank v. Augusta*, xxxvi. 255.

8. A corporation, owning personal property, not composing a part of its capital, may be taxed for it in the town of its established place of business. *Augusta Bank v. Augusta*, xxxvi. 255.

9. The term "inhabitants," as used in the R. S. of 1841, embraces bodies corporate, as well as individuals. The property of corporations, when not oth-



erwise subjected to assessment to the shareholders, is taxable to such corporation. And it is enough to incur such liability, that the corporation shall have the legal ownership. *Baldwin v. Tr's Min. Fund of Baldwin*, xxxvii. 369.

10. Thus, the trustees of a ministerial fund, though living in different towns, are liable to be assessed for such fund in the town where the income is to be applied. *Baldwin v. Tr's Min. Fund of Baldwin*, xxxvii. 369.

(c) *Making assessments.*

11. Taxes upon land, having been once paid by the money received upon an illegal sale, cannot be re-assessed, although, through illegality in the proceedings, either of the assessors or of the collector, the title of the owner was not impaired. *Packard v. New Limerick*, xxxiv. 266.

12. A tax cannot be assessed as delinquent highway tax, when the list returned by the highway surveyor does not bear his signature; nor unless the surveyor has given the notice and made the demand for services required by the statute. *Patterson v. Creighton*, xlii. 367.

## II. ABATEMENT.

13. Before the provisions of R. S. of 1841, c. 14, § 18, can be made available by any inhabitant, he must personally carry in such list to the assessors, and make oath to its correctness, if required; or show to the commissioners that he was unable to offer such list at the time appointed. *Winslow v. Co. Com.*, xxxvii. 561.

## III. SALES OF LAND FOR TAXES.

14. In trespass *quare clausum*, a mere stranger, without semblance of title, cannot object, under the general issue, to the plaintiff's deed, coming from the County Treasurer, purporting to convey the land for the payment of taxes assessed thereon, because the treasurer had not observed the rules of law, in making the sale. *Smith v. Bodfish*, xxvii. 289.

15. But, if the defendant produces a *prima facie* title to the land, the plaintiff, to support his tax title, must show that the provisions of the law, authorizing such sale, have been strictly complied with. *Smith v. Bodfish*, xxvii. 289.

16. The County Treasurer, in selling a township of unincorporated land for taxes assessed thereon by the Commissioners, for the purpose of making a road through the same, cannot exempt any portion of the township, except the reserved public lots, from its liability for the tax, unless owned by individuals who have paid their proportions of the tax; and, in order to authorize a sale of the residue, it should appear, by the recitals in the deed, who had so paid previously to the sale, the amount paid by each, and the quantity of land on which each payment had been made. *Smith v. Bodfish*, xxvii. 289.

17. Where a lot of unimproved land is taxed as the "real estate of a non-resident proprietor, whose name is unknown," described in the assessment only as a certain lot on a certain plan of lots in the town, and is advertised and sold as such for taxes, when in fact, at the time of the assessment and long before and afterwards, the owner, deriving his title of the lot under a deed duly recorded, resided in the same town wherein the land is situated,

such sale is illegal, although the collector conformed to the law in all respects in selling. *Barker v. Hesselstine*, xxvii. 354.

18. In a County Treasurer's sale of land for taxes, where there is no stipulation before the sale that a credit is to be given, and the treasurer receives a note for a part of the purchase money, this does not invalidate the sale. *Longfellow v. Quimby*, xxix. 196.

19. The title arising to a town, by a forfeiture of non-resident lands, for the non-payment of town taxes, is not perfected, unless nine months fully expire after the date of the assessment, and before the collector makes to the treasurer a certificate of the delinquency, to pay the tax; nor unless the treasurer authenticate, as true, the copy of his printed advertisement, lodged with the clerk; nor unless it appear that the collector had a warrant from the assessors to collect the tax. *Flint v. Sawyer*, xxx. 226.

20. Where the assessment was made August 14, and the collector's return was made May 13, following:—*Held*, that the collector should have waited during all the business hours of May 14, before he made his certificate. *Flint v. Sawyer*, xxx. 226.

21. Sales of the land of resident proprietors, for the non-payment of taxes, are invalid, unless it appears, from the advertisements for the sale, that nine months from the date of the assessment had already elapsed. *Hobbs v. Clements*, xxxii. 67.

22. Where lands, belonging to a non-resident, are taxed to the tenant in possession, though the tax may rightfully be collected of the tenant, yet, whether, for the collection of the tax, the land can be sold, as land of a resident owner, *quere*. *Hobbs v. Clements*, xxxii. 67.

23. An agent employed by the owner of land, to bid off the same, when sold at auction for taxes, cannot acquire title to himself, by taking the deed in his own name. *Matthews v. Light*, xxxii. 305.

24. In order that a collector's deed of land, sold by him for taxes, shall convey title, it must appear that the provisions of law, preparatory to and authoritative of, such sale, have been strictly complied with. *Matthews v. Light*, xxxii. 305. *Stevens v. McNamara*, xxxvi. 176. *Phillips v. Phillips*, xl. 160.

25. Several lots of land, belonging to a non-resident, were inventoried and valued separately by the assessors. They were taxed in an aggregate sum, and advertised as separate lots, specifying a tax on each:—*Held*, that a sale of them all, *in solido*, for a gross sum, for payment of the tax, conveyed no title. *Andrews v. Senter*, xxxii. 394.

26. In tax sales under the Act of 1826, c. 337, unless the collector "record and return to the treasurer his particular doings," within thirty days, as required by the eighth section, the sale is void. *Andrews v. Senter*, xxxii. 394.

27. So also it is void, unless the return designate or describe the land sold. *Andrews v. Senter*, xxxii. 394.

28. A collector's sale of land for the payment of taxes, under the Act of 1821, c. 116, is void, if made more than two years from the date of his tax warrant, although the land was duly seized and advertised within the two years. *Usher v. Taft*, xxxiii. 199.

29. The recitals in a County Treasurer's deed for the conveyance of land for taxes are not conclusive, as evidence of the facts therein stated. *Longfellow v. Quimby*, xxxiii. 457.

30. A sale of land, by the County Treasurer, for taxes to build a road in an unincorporated township, was not rendered void under the Act of 1821, c. 118, because the land did not bring price enough to pay the whole assessment; nor because the assessing officers, in computing the number of acres to be assessed, excluded that portion of the tract which was covered by water. *Longfellow v. Quimby*, xxxiii. 457.

31. A party claiming to hold land under a tax title must prove the facts necessary to establish its validity in equity as well as in law. *Howe v. Russell*, xxxvi. 115.

32. A sale of land for the non-payment of a tax upon an inhabitant, in which he was assessed not only for his own land, but for land which he never owned, or occupied, or claimed, is void. *Barker v. Blake*, xxxvi. 433.

33. Where the statute required that the sheriff proceed to sell so much of said land as will discharge said taxes and reasonable expenses, a sale of the whole tract to the highest bidder is invalid. *Loomis v. Pingree*, xliii. 299.

#### IV. REMEDY FOR ILLEGAL ASSESSMENTS.

34. Where a person has paid taxes illegally assessed upon him, he cannot recover back the amount, unless he paid them under duress of his person, or seizure of his property, or under protest. *Smith v. Readfield*, xxvii. 145.

35. The mere fact that the taxes were paid to a collector, who had a warrant for the collection, affords no satisfactory proof of payment by duress. *Smith v. Readfield*, xxvii. 145.

36. Neither can he recover them of the town, without proof of payment to some legal officer or agent of the town, authorized to receive the money. *Smith v. Readfield*, xxvii. 145.

37. Where a person has been compelled to pay a town tax, wrongfully assessed upon him, he may recover it back from the town in an action for money had and received. *Briggs v. Lewiston*, xxix. 472.

38. But the charges for officer's fees and for commitment, cannot be recovered from the town. *Briggs v. Lewiston*, xxix. 472.

39. If the assessors, through an error in judgment, make an over-valuation of one's property, and thereby assess him too much, or tax him for property not belonging to him, his remedy is not by an action of law, but by an appeal to the County Commissioners. *Stickney v. Bangor*, xxx. 404. *Hemingway v. Machias*, xxxiii. 445.

40. The right of action against a town, under R. S. of 1841, c. 14, § 88, does not extend to errors in judgment respecting the value of personal property, liable to be assessed. *Stickney v. Bangor*, xxx. 404.

#### V. REDEMPTION AND FORFEITURE.

41. The assessment and collection of State taxes, for several successive years, after a forfeiture to the State had accrued for the non-payment of a previous year, are not deemed a waiver of the forfeiture. They might be considered a pledge, that the State would still allow the proprietor to redeem against the forfeiture. *Hodgdon v. Wight*, xxxvi. 326.

42. A statute, passed several years after such forfeiture had accrued, and allowing the land to be redeemed within a limited time, may be taken into

account to show that the State never intended to preclude the proprietor from redeeming. But, under the lights of such a statute, the State, by continuing to assess and collect the subsequent taxes, cannot be considered to have waived its claim to the forfeiture, further than it has manifested its intention to do so by its enactments. *Hodgdon v. Wight*, xxxvi. 326.

43. R. S. of 1841, c. 14, § 87, is still in force, excepting as modified by c. 123, of the Acts of 1844. *Hill v. Mason*, xxxviii. 461.

44. To work a forfeiture of lands owned by non-residents, it must appear that the collector certified to the treasurer the delinquencies of the payment of taxes upon such real estate, and that they were advertised within three months. And the party claiming such forfeiture must show that a copy of the delinquencies was lodged with the clerk of the town in which the lands are situated. *Hill v. Mason*, xxxviii. 461.

45. An offer of payment, within the time allowed by law, for the purpose of saving a forfeiture, must be regarded, for that purpose, as equivalent to an actual payment made at the time of the offer, and the money need not be brought into court. *Loomis v. Pingree*, xliii. 299.

## VI. EVIDENCE.

46. The Act of 1844, c. 123, § 16, prescribing the evidence necessary to sustain a town-collector's sale of land for taxes, is applicable to sales made previously, as well as to sales made subsequently to that statute. *Freeman v. Thayer*, xxxiii. 76.

47. The covenants in a collector's deed of land, sold for taxes, that the proceedings, the assessment and sale, were according to law, are not evidence that the necessary steps were taken to pass the title to the grantee, in an action against one in possession under a recorded deed. *Phillips v. Phillips*, xl. 160.

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## TELEGRAPH.

See *Wax*, 60.

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## TENANTS IN COMMON

See *JOINT TENANTS*, &c.

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## TENANT BY CURTESY.

See *HUSBAND AND WIFE*, 28.

## TENANT AT WILL.

See LANDLORD AND TENANT, 7, 8, 9, 10, 12.

## TENDER.

1. When a contract is made by several persons jointly, and the act to be done by the contractee is that of offering a deed of conveyance, it is not necessary to make the offer to more than one of them. *Oatman v. Walker*, xxxiii. 67.

2. When a party has obligated himself to receive a deed of land, and to pay therefor a stipulated sum, and the deed, though refused, was duly tendered and placed in a position to await the call of the obligor, the damage to be recovered, in a suit upon the obligation, is the contract price and interest. *Oatman v. Walker*, xxxiii. 67.

3. The tender of a deed, and continued readiness to deliver it, by one who had given bond to convey, will transfer no title. *Dwinel v. Holmes*, xxxiii. 172.

4. A tender of costs, (due on a recognizance to prosecute an appeal,) if not made until after taxation of the costs, is without legal effect. *Merrick v. Farwell*, xxxiii. 253.

5. Whether such a tender, though made at the time of the taxation, would be available, *non dicitur*. *Merrick v. Farwell*, xxxiii. 253.

6. For a party who claims under a tender, made after the agreed pay-day, and relies upon circumstances to justify the delay, a suit at law is not an available remedy, although the time of payment was not of the essence of the contract. *Hill v. Fisher*, xxxiv. 143.

7. Chapter 115, § 22, of R. S. of 1841, as amended by the Act of amendment, authorizing a tender of amends, &c., has reference to the act of trespass, and not to the reasons or motives of the trespasser. HATHAWAY, J., dissenting. *Brown v. Neal*, xxxvi. 407.

8. A tender may be made after action brought and before entry, with the same effect as before the commencement of the suit. *Call v. Lothrop*, xxxix. 434.

9. Where the principal and sureties on a poor debtor's bond are sued, but no service made, a tender of the amount of the joint liability, including the cost of the writ, will be sufficient, although the writ may have been sent away to be served, if there is time to have it recalled before it is actually served. *Call v. Lothrop*, xxxix. 434.

10. In such suit, where the tender covers the joint liability, no costs can be recovered by the plaintiff, though he is entitled to a separate judgment against the principal for twenty per cent. interest on the amount due, beyond the amount tendered. *Call v. Lothrop*, xxxix. 434.

See TAX, 45.

## TESTAMENTARY TRUSTEES.

See PROBATE COURT, 16, 20.

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## TIME.

When a statute requires an act to be performed in a certain time from the date of some transaction, the day of such date is excluded, in the computation of the time. *Flint v. Sawyer*, xxx. 226.

See BILLS, &c. 11, 104, 118.

BOND, 30.

CONTRACT, 68, 79.

EQUITY, 139, 140.

LIMITATION, 20—23.

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## TITLE TO REAL ESTATE.

1. Where a party claims title to real estate by statute provisions, he must show a strict compliance with such provisions. *Storer v. Little*, xli. 69. *Lumbert v. Hill*, xli. 475. *Scammon v. Scammon*, xli. 561. *Benson v. Smith*, xlii. 414.

2. A title cannot be acquired by a location of a lot reserved for public uses, under R. S. of 1841, c. 122, § 4, unless the return of the committee, after having been accepted by the Court, is recorded in the registry of deeds within six months. *Scammon v. Scammon*, xli. 561.

3. Under an article in a warrant for a town meeting, “to see if the town will relinquish their right to any part of the eight rod allowance on lot No. 63, to E. S., as a compensation for land had of E. S., on said lot No. 63, for a road for a landing, or act thereon as they may think proper;” it was voted to relinquish to E. S. two rods of the eight rod allowance, &c.:—*Held*, that in the absence of evidence showing the mode in which the town “had the land of E. S., the language of the warrant and votes cannot be treated as sufficient proof of title. *Vassalborough v. S. & K. R. R. Co.*, xliii. 337.

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## TOWN.

I. POWERS AND LIABILITIES.

II. MEETINGS, WARRANT AND RETURN FOR.

III. TOWN OFFICERS.

IV. DIVISION OF TOWNS.

## I. POWERS AND LIABILITIES.

1. A surveyor of highways, who, after having expended the assessments committed to him, is directed by the selectmen to proceed and expend a further sum, has no remedy against the town for remuneration of such sum, unless such direction was in writing. *Morrell v. Dixfield*, xxx. 157. *Field v. Towle*, xxxiv. 405.

2. The plaintiff and another made separate claims against a town, growing out of a connected transaction. The town voted to allow the plaintiff \$700, provided the other person would accept \$200 for his claim, which he refused to do:—*Held*, the town had the right to affix the condition; that it was not of that class which is void because impossible to be performed; and that it would not support an action for the plaintiff. *Morrell v. Dixfield*, xxx. 157.

3. A town is not responsible for the failure of the title to land sold and conveyed by their collector for town taxes. *Packard v. New Limerick*, xxxiv. 266.

4. The statute imposes no liability upon a town for any defect, or want of repair in its public roads, so long as they are kept in a condition safe and convenient for travelers. *Peck v. Ellsworth*, xxxvi. 393.

5. Sections 57 and 89, of R. S. of 1841, c. 25, entitled “of ways,” are in harmony and are counterparts of each other. *Peck v. Ellsworth*, xxxvi. 393.

6. If, from an omission on the part of a town to keep in repair its culvert under one of its public roads, an injury occur to the neighboring land from a flowing back of the water, the remedy, if any, against the town, is only at common law. *Peck v. Ellsworth*, xxxvi. 393.

7. When such back-flowing arises from an obstruction placed in the culvert by a mere wrongdoer, the town is not liable either by the statute or common law. *Peck v. Ellsworth*, xxxvi. 393.

8. In an action against a town for injury from a defective highway, proof that it was suffered on the precise day alleged in the writ is not required. *Tripp v. Lyman*, xxxvii. 250.

9. Towns are bound to make and keep their highways “safe and convenient” for travelers. *Tripp v. Lyman*, xxxvii. 250.

10. For an injury received by a defect occasioned by the freezing and thawing of the road, towns are liable to the party injured, if they have reasonable notice. *Tripp v. Lyman*, xxxvii. 250.

11. But evidence, that a greater portion of the ways in the same town was defective for the same cause only, is inadmissible. *Tripp v. Lyman*, xxxvii. 250.

12. The provisions of the common law and of the statute of 22 Henry viii., as to the parties required to keep in repair highways and bridges, have been superseded by R. S. of 1841, c. 25, § 57; since which, the obligations of towns in the premises is absolute and unqualified; and, for neglect of this duty, they are liable to indictment. *State v. Gorham*, xxxvii. 451.

13. Towns may compel the party bound to maintain railroad bridges, built to enable the railroad to pass over or under any way, &c., to make any reasonable repairs, by the writ of mandamus; or, if they have made any expenditures thereon, may reimburse themselves by an action on the case. *State v. Gorham*, xxxvii. 451.

14. Where a town neglects to open and build a legal road, laid out by the commissioners, within the time limited for that purpose, the town becomes liable at that time to pay the expenses consequent on such neglect. *Page, pet'r*, xxxvii. 553.

15. And that, too, although the territory over which the road was laid was incorporated into another town before the road was opened and completed by the agent. *Page, pet'r*, xxxvii. 553.

16. Towns, in making necessary repairs upon their streets and sidewalks, may obstruct them and interrupt the public travel, without incurring any liability therefor, if they are not left in the night time without precautionary means for warning travelers of their danger; in which latter case, towns are liable. *Kimball v. Bath*, xxxviii. 219.

17. For injuries occasioned by a necessary alteration of an highway through want of sufficient notice or warning of such change, the town is primarily liable, although such alteration is being effected by a railroad company, under authority of their charter. *Phillips v. Veazie*, xl. 96.

18. When, by reason of snow drifts, that part of a highway prepared for travel becomes impassable, and a passage way outside and over the gutter of the road is used instead of it, the town is liable for damages sustained by travelers over such passage way. And if a thaw and rain occur prior to the accident, it is sufficient notice to the town that such passage way is unsafe. *Savage v. Bangor*, xl. 176.

19. A town can maintain no action against an individual for destroying a bridge, being part of one of their highways which they were bound to keep in repair, until they have repaired it or incurred some expense in consequence of the wrongful act. *Freedom v. Weed*, xl. 383.

20. As a general rule, corporations are not responsible for the unauthorized or unlawful acts of its officers. *Mitchell v. Rockland*, xli. 363.

21. A town is not legally responsible for improper proceedings, willful or otherwise, by the majority of a school district. *Trim v. Charleston*, xli. 504.

22. Towns are not responsible for nuisances arising from the unlawful use of the highway without their knowledge or assent, the road, as a road, being safe and convenient. *Davis v. Bangor*, xlii. 522.

23. A city is not liable for an injury occasioned by teams standing on a bridge or street for market, and waiting for purchasers under the care of their drivers. *Davis v. Bangor*, xlii. 522.

24. While A. was driving his horse, harnessed to a chaise, over a bridge, the horse took fright at a tree on a wagon which was standing there temporarily, in charge of the driver, ran away, overturned the chaise and injured A.:—*Held*, that the town was not liable therefor, either civilly or criminally. *Davis v. Bangor*, xlii. 522.

25. Municipal officers cannot bind their town or city by their individual assent to the wrongful acts of others. *Davis v. Bangor*, xlii. 522.

See COMMITTEE.

CONTAGIOUS SICKNESS.  
WAYS.



## II. MEETINGS, WARRANT AND RETURN FOR.

26. Under an article in a warrant, "to choose selectmen, assessors and all other officers that the law requires or may be thought necessary," a fish committee may be legally chosen. *Spear v. Robinson*, xxix. 531.

27. Where the return upon a warrant for a town meeting did not show that the copies posted were attested, or that they were posted in conspicuous places, evidence to these points will not cure the defect, in a penal action. *Fossett v. Bearce*, xxix. 523.

28. An officer's return that he posted the notices in a "public" place, without saying in a "public and conspicuous" place, is insufficient. *Bearce v. Fossett*, xxxiv. 575.

29. In a warrant calling a town meeting to act upon the acceptance of a town way, a general description of the way is sufficient. *State v. Beeman*, xxxv. 242.

30. Where it was required by a town, that notice of its meetings should be posted at the town-house on a specified street, posting at "the town-house" was held sufficient, it not being shown that more than one town-house existed. *State v. Beeman*, xxxv. 242.

## III. TOWN OFFICERS.

## (a) ELECTION AND QUALIFICATION.

## (b) POWERS AND DUTIES.

(a) *Election and qualification.*

31. Where the statute requires that certain town officers shall be freeholders, the choice of a person who is not a freeholder is merely void. *Spear v. Robinson*, xxix. 531.

32. At a meeting insufficiently called, no officer can be legally chosen. *Bearce v. Fossett*, xxxiv. 575.

33. A person elected at such meeting, though sworn into office, can draw, from such an election, no justification for acts done under color of the office. *Bearce v. Fossett*, xxxiv. 575.

34. Where one, justifying as a town officer, has read the record of his election, it is competent for the other party to show the illegality of the election, by reading from the record a copy of the return upon the warrant calling the meeting. *Bearce v. Fossett*, xxxiv. 575.

35. The words "duly sworn," or "sworn according to law," when applied to any officer who is required to take and subscribe the oath prescribed in the constitution, are to be construed to mean, that he has taken the oath as required; and, when applied to any other person, that such person has taken an oath faithfully and impartially to perform the duties assigned to him in the case specified. *Bennett v. Treat*, xli. 226.

(b) *Powers and duties.*

36. In drawing an order upon the treasurer, in payment of a debt due from the town, the selectmen have authority to make it negotiable in its form. *Willey v. Greenfield*, xxx. 452.

37. There is no law requiring city or town officers to know the contents of all the corporation records. *Lancey v. Bryant*, xxx. 466.

38. Diligence and care, in ascertaining the contents of corporation records upon a specified subject, cannot be required of the corporation officers, while it is not shown, that they knew of the existence of such records. *Lancey v. Bryant*, xxx. 466.

#### IV. DIVISION OF TOWNS.

39. The boundaries of towns are created, and may be changed by Legislative enactments; but no corporate acts by the inhabitants thereof can alter them. *Ham v. Sawyer*, xxxviii. 37.

40. All that part of the town of Monmouth which was excluded therefrom, by the new western boundary established by the Act of March 3, 1809, was included in, and became a part of the town of Leeds. *Ham v. Sawyer*, xxxviii. 37.

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#### TOWN CLERK.

1. Town clerks are not restricted in making the records of the births and deaths, which occur during their continuance in office, and they are not forbidden to record births and deaths, even a longer time than six months after their occurrence. *Lake v. Ellsworth*, xl. 343.

2. But, when the record is once made, the loss or destruction of it will not authorize the clerk to demand remuneration for making a new one, without authority from the town. *Lake v. Ellsworth*, xl. 343.

3. For recording all births and deaths in the town, *which have come to his knowledge*, and which had not been previously recorded, the clerk is entitled to the statute remuneration from the town. *Lake v. Ellsworth*, xl. 343.

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#### TREATIES.

1. Although the preamble to a treaty does not form a part of the contract, its averments are to be regarded as admitted truths. *Little v. Watson*, xxxii. 214.

2. When the language used clearly declares a fact, or grants, confirms or defines a right, it must be effectual, even if inconsistent with the purpose disclosed by the correspondence which preceded it. *Little v. Watson*, xxxii. 214.

3. The treaty of Washington, of 1842, asserts, that that part of the line dividing the United States from New Brunswick, between the monument at the source of St. Croix and St. John rivers, was never ascertained and de-

terminated; and the fact thus asserted is not to be brought into question. *Little v. Watson*, xxxii. 214.

4. This treaty established, between said monument and the St. John river, a new conventional line of boundary between this State and New Brunswick, irrespective of the one provided for by the treaty of Paris, in 1783. *Little v. Watson*, xxxii. 214.

5. One, who, at the time of the ratification of the treaty of Washington, was, and for several years, had been in possession of land under a grant from New Brunswick, has a title, which, by the 4th article of said treaty, is "held valid, ratified and confirmed" to him, although said land in fact lies within the limits of the United States, as established conventionally by the same treaty. And that provision is binding upon this Court, without the interposition of any legislative action. *Little v. Watson*, xxxii. 214.

6. Grants of land made by the British government, within the scope of that provision, cannot be vacated, even in a suit for the same land brought by a grantee of the State, within whose territory it is found to belong. *Little v. Watson*, xxxii. 214.

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## TREES.

Trees, so soon as severed from the soil, become personal property. *Moody v. Whitney*, xxxiv. 563. *Whidden v. Seelye*, xl. 247.

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## TRESPASS.

- I. WHEN THE ACTION WILL LIE, AND FOR WHOM.
- II. PLEADINGS, JUDGMENT AND EVIDENCE.

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### I. WHEN THE ACTION WILL LIE, AND FOR WHOM.

- (a) FOR INJURIES TO REAL ESTATE.
- (b) FOR INJURIES TO PERSONAL ESTATE.
- (c) FOR INJURIES UNDER PROCESS OF LAW.

#### (a) *For injuries to real estate.*

1. Where a trespass has been committed upon land, of which the plaintiff is part owner, it cannot be defeated by a subsequent payment to his co-tenant. *Longfellow v. Quimby*, xxix. 196.

2. Nor is the trespass a wanton one, as a matter of law, though committed without license from any owner of the land. *Longfellow v. Quimby*, xxix. 196.

3. If cattle, being wrongfully upon land, pass therefrom upon the plaintiff's adjoining unfenced lot, not bordering upon the highway, he may maintain trespass therefor against their owner. *Lord v. Wormwood*, xxix. 282.

4. If a mortgager's tenant at will refuse to attorn to the mortgagee, (after

having entered to foreclose,) or to quit the premises, the mortgagee may maintain trespass against him, for the subsequently accruing rents. *Hill v. Jordan*, xxx. 367.

5. One co-tenant may recover, by trespass against another, treble damages for strip and waste committed by him, during the pendency of a petition for partition, though the defendant be the petitioner. *Maxwell v. Maxwell*, xxxi. 184.

6. In a tenancy at sufferance, of a house and lot, the landlord is chargeable in trespass *quare clausum*, for entering by force to the injury of the tenant or his family, even after two months verbal notice. *Brock v. Berry*, xxxi. 293.

7. Trespass *quare clausum* may be maintained by the owner of land, for an injury to the freehold, though it be in the occupation of his tenant at will. *Davis v. Nash*, xxxii. 411. *Jewett v. Whitney*, xliii. 242.

8. A tenant in common of a meeting-house may maintain trespass for injury to one of the pews, against a stranger to both the pew and meeting-house. *Murray v. Cargill*, xxxii. 517.

9. Where there has been no *legal* division fence between adjoining lots, it is trespass, if the cattle of the owner of one cross upon the land of the other. *Sturtevant v. Merrill*, xxxiii. 62.

10. A reversioner, though wrongfully in possession, may maintain trespass against a mere stranger to the title. *Rollins v. Clay*, xxxiii. 132.

11. An action of trespass *quare clausum* may be maintained against the mortgagee of a railroad corporation, (who had entered to foreclose his mortgage,) for a continuance of the occupation of the land taken under the railroad charter, unless, within a reasonable time after the commencement of such occupation, compensation be made or tendered. And, under such circumstances, the plaintiff may recover for all the injuries, occasioned by the prior occupation. *Cushman v. Smith*, xxxiv. 247.

12. The levy of an execution upon the property of a corporation is not a trespass, though, both in the judgment and in the execution, their name is variant from that given by their charter. *Wilton Manuf'g Co. v. Butler*, xxxiv. 431.

13. In trespass *quare clausum*, an absolute title is not essential. *Dunlap v. Glidden*, xxxiv. 517. *Hunt v. Rich*, xxxviii. 195.

14. Against an occupant of land, whose possession has been of such a character and continuance as to entitle him to betterments, trespass *quare clausum* will not lie for acts done during such possession. *Paine v. Marr*, xxxv. 181.

15. Until a tenancy at will is terminated, trespass *quare clausum*, by the owner against the tenant, cannot be maintained. *Young v. Young*, xxxvi. 133.

16. Where contractors with a town to open a county road invited another individual to pass over the road while in process of construction, to test its efficiency, such person is not liable in trespass to the owner of the soil. *Wight v. Phillips*, xxxvi. 551.

17. A recorded deed of real estate is sufficient authority for the holder to maintain trespass for a wrong to the estate; and the defendant cannot controvert the plaintiff's title of record, unless his acts were authorized by one having title or right thereto. *Wentworth v. Blanchard*, xxxvii. 14.

18. One, without lawful authority from the town obligated to keep it in repair, cannot reconstruct one of its highways, and make it safe and conve-

nient in parts of it not previously actually used by travelers. For such acts he is liable in trespass to the owner; and possession is sufficient title in such case. *Hunt v. Rich*, xxxviii. 195.

19. Trespass *quare clausum* cannot be maintained by the owner of land, for an injury to the grass only, while in the occupation of his tenant at will. *Lyford v. Toothaker*, xxxix. 28.

20. A conveyance of land, for a valuable consideration, was made by a debtor, with the intent to defraud his creditors, but without that knowledge on the part of the grantee, who afterwards conveyed it to a third person, the original fraudulent grantor paying the consideration therefor; whereupon a prior creditor levied upon said land:—*Held*, that no title passed by the levy; and that, for any acts of ownership upon such land, under such levy, the creditor is liable in trespass to the legal owner. *Davis v. Tibbets*, xxxix. 279.

21. An action of trespass on the case is maintainable by the owners of the fee, against a tenant at will, for acts prejudicial to the inheritance. *Files v. Magoon*, xli. 104.

22. The wrongful possession and conversion of the property of a corporation does not differ from any other trespass or tort, for which the sufferer has a remedy at law. *York & C. R. R. Co. v. Myers*, xli. 109.

23. A person's possession is presumed to be co-extensive with his grant, where there is no adverse possession; and that is sufficient to enable him to maintain trespass *quare clausum*. *Melcher v. Merryman*, xli. 601.

24. Where an entry is made under authority or license given to the party by law, and he abuses it, he becomes a trespasser *ab initio*. *Hunnewell v. Hobart*, xlii. 565.

25. Where an entry is made by the authority or license of the party in possession, and the person so entering abuses the privilege, he is liable for such abuse, but is not a trespasser *ab initio*. *Hunnewell v. Hobart*, xlii. 565.

26. A co-tenant in possession may maintain trespass *quare clausum* against a stranger for an injury to the freehold. *Jewett v. Whitney*, xliii. 242.

27. Trespass is the proper form of action to recover damages arising from the building of a dam, whereby the plaintiff's hay was injured. *Reynolds v. Chandl. River Co.*, xliii. 513.

(b) *For injuries to personal estate.*

28. Where timber was cut, upon two tracts of adjoining lands of different owners, by a trespasser, and the whole was so intermixed by him, or persons claiming under him, that the part belonging to each owner could not be distinguished; and the owner of one tract seized and took possession of the whole:—*Held*, that one claiming under the wrongdoer could not maintain trespass against him for such taking. *Bryant v. Ware*, xxx. 295.

29. An officer who seizes goods as the property of a debtor, which do not belong to him, is a trespasser; and no subsequent disposition of the property can deprive the true owner of his rights thereto. *Symonds v. Hall*, xxxvii. 354.

30. A purchaser of such goods, at a public sale, acquires no title to the property as against the owner; and, if he remove them, he is liable in trespass. And the officer and purchaser may be joined in one action. But

damages for the separate trespass of one of the defendants cannot be included in a judgment against both. *Symonds v. Hall*, xxxvii. 354.

31. A settlement by one of two joint trespassers, for one-half of the property taken, will not preclude the owner from maintaining trespass against the other to recover the balance; and though the trespassers were partners. *McCrillis v. Hawes*, xxxviii. 566.

(c) *Under process of law.*

32. A collector of taxes, who receives a surplus of money upon the sale of property for a tax, and omits to render to the owner "an account in writing," of the sale and charges, is a trespasser *ab initio*. *Blanchard v. Dow*, xxxii. 557.

33. An officer, who had authority to remove from the street the building of another person, and made sale of a part of its materials after such removal, is a trespasser *ab initio*; and is chargeable for the whole value of the building. *Mussey v. Cahoon*, xxxiv. 74.

34. Trespass cannot be maintained against an officer for selling, on execution, by virtue of an attachment on the writ, property which the debtor claimed to hold exempt from liability for debt, unless it was exempt when attached. *Greaton v. Pike*, xxxiv. 233.

35. An officer who attaches property on mesne process, and sells it thereon, without the consent of the creditor or owner, or otherwise than by the mode prescribed in R. S. of 1841, c. 114, § 53, becomes a trespasser *ab initio*; and the pendency of the action, on which such property was attached, interposes no obstacle to an immediate suit by the owner. *Ross v. Philbrick*, xxxix. 29.

36. The rights of a plaintiff, in trespass, are not enlarged by the fact that the defendant seized the property sued for under an illegal warrant, if, at the time of the seizure, the plaintiff held the property in disregard of law. *Lord v. Chadbourne*, xlii. 429.

## II. JUDGMENT, PLEADING AND EVIDENCE.

37. In trespass *quare clausum*, evidence of acts upon other lands of the plaintiff, than those described in the writ, is inadmissible. *Longfellow v. Quimby*, xxix. 196.

38. In trespass for strip and waste, by one co-tenant against another, if the whole of an averment might be stricken out, and yet leave sufficient allegations upon which to support the action, such averment need not be proved. *Maxwell v. Maxwell*, xxxi. 184.

39. The declaration need not name the other co-tenants. *Aliter*, in suits against strangers to the common property. *Maxwell v. Maxwell*, xxxi. 184.

40. In trespass *quare clausum*, no one can justify under another's title, except by showing that the acts were done by his authority. *Dunlap v. Glidden*, xxxi. 510. *Wentworth v. Blanchard*, xxxvii. 14. *Blaisdell v. Roberts*, xxxvii. 239.

41. It is sufficient to sustain trespass for cutting trees upon the land of the plaintiff, where the line is in dispute, if the jury are satisfied that the defendant cut them, and they believe that the evidence in relation to the land clearly preponderated in favor of the plaintiff. *Moulton v. Powers*, xxxii. 375.

42. A recovery and satisfaction of a judgment, against one of several joint trespassers upon land, will discharge an action by the same plaintiff, previously commenced against another joint trespasser for the same act. *Mitchell v. Libbey*, xxxiii. 74.

43. To trespass for breaking and entering a building, it is no defence that an article, belonging to the defendant, had been deposited, by his consent, within the building, and that the breaking and entering were for the purpose of taking it away. *Crocker v. Carson*, xxxiii. 436.

44. In trespass *quare clausum*, if the defendant plead not guilty to the whole trespass alleged, with or without a brief statement, the plaintiff has no occasion to make a new assignment. *Palmer v. Dougherty*, xxxiii. 502.

45. Tenants in common may join or sever in personal actions for injuries to their land. *Palmer v. Dougherty*, xxxiii. 502.

46. An allegation for breaking and entering into land is of substance; and a count, containing no such allegation, but framed technically in case, for injuries to land, or in trespass *de bonis*, for goods taken from it, cannot be sustained by proof merely of an unlawful entry. *Sawyer v. Goodwin*, xxxiv. 419.

47. Nor can a declaration in trespass *quare clausum*, alleging immediate acts of injury to land, be sustained by proof of an injury consequentially resulting from acts done on the land. To such a declaration, an amendment, introducing a count in case, is not allowable. *Sawyer v. Goodwin*, xxxiv. 419.

48. To support trespass, for an injury done by a party in the exercise of his lawful rights, it must appear that no neglect or want of care on the part of the plaintiff co-operated in producing the injury. *Waldron v. P. S. & P. R. Co.*, xxxv. 422.

49. In such a suit, the plaintiff must show the exercise of ordinary care on his part, and the omission of some duty or the commission of some wrong on the part of the defendant, by which the injury was produced. *Waldron v. P. S. & P. R. Co.*, xxxv. 422.

50. If the injury be such as must have occurred wholly from the carelessness of one of the parties only, the plaintiff must show that it was on the part of the defendant. *Waldron v. P. S. & P. R. Co.*, xxxv. 422.

51. A judgment in trespass against the principal for the act of his servant, rendered upon a trial of the merits of the case, is a bar to a suit against the servant for the same act; and parol evidence is admissible to show that the same matter was directly in issue in the two suits. *Emery v. Fowler*, xxxix. 326.

52. And, where such judgment was rendered after the pleading of the general issue in the action against the servant, it is admissible under that plea. *Emery v. Fowler*, xxxix. 326.

53. To maintain trespass *quare clausum*, against the owner of the opposite shore for intermeddling with his dam, the owner of the dam must show his prescriptive right by adverse occupation twenty years. *Trask v. Ford*, xxxix. 437.

See AMENDMENT, 17.

## TROVER.

- I. WHEN IT LIES.
- II. PARTIES.
- III. CONVERSION.
- IV. PLEADINGS.

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I. WHEN IT LIES.

1. Where goods were sold while in the tortious possession of a third person claiming them, the purchaser, after demand, may maintain trover for them against such third person, though they were never delivered. *Cartland v. Morrison*, xxxii. 190.

2. Trover is a transitory action; and it lies for a conversion of property, committed within the limits of a foreign jurisdiction. *Robinson v. Armstrong*, xxxiv. 145. *Whidden v. Seelye*, xl. 247.

3. A person who has no possession, actual or constructive, of property, at the time of a demand by the owner, nor has previously wrongfully possessed or withheld it, cannot be made liable in trover for refusal to deliver it, although he may have withstood the efforts of the owner to obtain possession, or prevented him by force. *Boobier v. Boobier*, xxxix. 406.

4. In trover, the action may be defeated by showing that the plaintiff had no title at the commencement of the suit. *Clapp v. Glidden*, xxxix. 448.

5. In trover, when the property of plaintiff is once established, possession by the defendant will not draw after it that presumptive evidence of ownership which will excuse him from proving title. *Weston v. Higgins*, xl. 102.

6. The plaintiff, being a bankrupt, deposited certain negotiable and negotiated notes with the executor of his father's will, and afterwards procured them, by giving a bond of indemnity to secure the executor against any liability to the creditors and legatees of the estate, and also against the plaintiff's assignee in bankruptcy, or the assigns of such assignee; at the same time, he passed over the notes to his surety on the bond, to indemnify him for signing it. The surety transferred the same notes to the defendant, and took a bond from him against his said liability. Afterwards, the plaintiff's assignee in bankruptcy sold his right in this and other property, and the purchaser, in an action of trover against the executor, obtained a judgment for the value of the notes:—*Held*, that the defendant had a right to withhold the notes from the plaintiff; and that trover would not lie. *Perley v. Dole*, xl. 139.

7. A mortgagee in possession may maintain trover against a stranger who cuts trees upon the mortgaged premises and takes them away. *Whidden v. Seelye*, xl. 247.

8. The owner of land, refusing to deliver to the purchaser a dwellinghouse erected upon such land by the owner's consent, and, by his acts, showing an appropriation of it to his own use, is liable in trover. *Pullen v. Bell*, xl. 314.

9. Trover will not lie against a depositary, who sells goods in his charge at a price less than the one fixed by the owner. It is a breach of duty, rather than an unlawful conversion. *Marr v. Barrett*, xli. 403.

10. M. instructed B., his factor, to sell a quantity of hay in W. But B., without authority, and having made no advances whereby he could have a



lien thereon, sent it to B. and sold it there:—*Held*, that this was a tortious conversion; and that trover would lie. *Marr v. Barrett*, *XL*. 403.

11. Trover will not lie without proof of property and the right of immediate possession in the plaintiff. *Ames v. Palmer*, *XLII*. 197.

See REVENUE LAWS.

## II. PARTIES.

12. One co-tenant may maintain trover against another who has assumed to own and sell the whole of the common property, such assumption being sufficient evidence of conversion. *Wheeler v. Wheeler*, *XXXIII*. 347.

13. Where the consignee of goods sells them with intent to defraud his consignor, and this intent is known to the vendee, it is a simultaneous joint conversion, for which trover will lie by the consignor against both. *White v. Wall*, *XL*. 574.

## III. CONVERSION.

14. Where the defendant knew of the wrong of S., and undertook to aid him in secreting the plaintiff's sheep, and keep them from the true owner; or when the defendant had been indemnified, before the suit was commenced, for withholding the sheep from the true owner, and prevented her from enjoying her property; or when he confederated with P. & S. for that purpose, and did withhold the sheep, it is a conversion. *Scott v. Perkins*, *XXVIII*. 22.

15. Conversion is sufficiently established by proof that the defendant had claimed the property as his own, and attempted to dispose of it for his own benefit. *Dickey v. Franklin Bank*, *XXXII*. 572.

16. A wrongful assumption of dominion over trees, severed from the soil, is a conversion of them. *Moody v. Whitney*, *XXXIV*. 563.

17. So is a tortious taking. *Moody v. Whitney*, *XXXIV*. 563.

18. Property may be wrongfully converted by two or more persons jointly, although the acts of one may have followed the acts of the other at successive periods of time, in producing the result. *Cram v. Thissell*, *XXXV*. 86.

19. Thus, where one unlawfully put his mark upon saw-logs, not belonging to himself, to aid another person in appropriating them wrongfully, and such other person, knowing that purpose, accordingly, at a subsequent time, took and used them, the conversion was held to be joint. *Cram v. Thissell*, *XXXV*. 86.

20. Where the defendants in trover set up title to the property by purchase, and fail to establish it, the conversion takes place when they received it and claimed it. *Head v. Goodwin*, *XXXVII*. 181.

21. There can be no conversion of property without an actual possession of it, or the exercise of such a claim of right or of dominion over it, as assumes a right to hold the possession or to deprive the other party of it. *Fernald v. Chase*, *XXXVII*. 289.

22. To make out a conversion, there must be proof of a wrongful possession, or of the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand. *Fernald v. Chase*, *XXXVII*. 289. *Fuller v. Tabor*, *XXXIX*. 519.

23. A mere declaration of ownership, without the taking of any possession or the exercise of any dominion, does not constitute a conversion. *Fernald v. Chase*, xxxvii. 289.

24. Thus, a declaration by an officer that he has attached personal property, without proof that he has taken possession or exercised any dominion or control of it, is not a conversion. *Fernald v. Chase*, xxxvii. 289.

25. Neither will such a declaration, made when in contact with the property, counting it, followed by a return of an attachment on the writ, and by certifying a copy of such return to the town clerk, and by the taking of an accountable receipt for it as property attached, justify a ruling, as matter of law, that there has been a conversion. *Fernald v. Chase*, xxxvii. 289.

26. The taking a quitclaim deed of a house and lot, and causing it to be recorded, is not of itself sufficient evidence of a conversion of the house, which was personal property. *Fuller v. Tabor*, xxxix. 519.

27. The law recognizes no distinction between an unlawful transportation and a tortious conversion. *Marr v. Barrett*, xli. 403.

#### IV. PLEADING.

28. Where one, having tortiously cut and carried away trees from the land of another, sells a part of them to a person having no knowledge of the wrong, the owner, though he can maintain trover against them jointly, can recover of the vendee only the value of the part which he purchased. *Moody v. Whitney*, xxxiv. 563.

29. An action of trover, in the form of an original summons, will be maintainable, unless the objection be taken seasonably in abatement or by motion; otherwise, it will be considered as waived. *White v. Wall*, xl. 574.

See AMENDMENT, 12.

### TRUSTEE PROCESS.

- I. PROCESS.
- II. DISCLOSURE.
- III. WHEN THE TRUSTEE WILL BE CHARGED.
- IV. WHEN DISCHARGED.
- V. EFFECT AS BETWEEN THE PRINCIPAL AND TRUSTEE.
- VI. PRACTICE.
- VII. GENERALLY.

#### I. PROCESS.

- (a) WHEN MAINTAINABLE.
- (b) WHERE, AND AGAINST WHOM.

##### (a) *When maintainable.*

1. If no tangible property of the principal defendant has been attached, and if neither he nor the supposed trustee reside within this State, the Court

has no jurisdiction. And a judgment, rendered against the trustee in such suit, is void. *Columbus Ins. Co. v. Eaton*, xxxv. 391. *Smith v. Eaton*, xxxvi. 298.

2. Such a suit, if the objection be seasonably taken, will abate. *Smith v. Eaton*, xxxvi. 298.

(b) *Where, and against whom.*

3. A trustee process, wherein the only trustees are a corporation aggregate, must be brought in the county in which they have their established and usual place of business, and held their last annual meeting. And if not there brought, the principal defendant, as well as the trustee, may abate the process by seasonably pleading the objection. *Scudder v. Davis*, xxxiii. 575.

## II. DISCLOSURE.

4. If mortgagees of personal property, when summoned as trustees of the mortgager, would rely upon a foreclosure, they must disclose the conditions of the mortgage, and state that a foreclosure had occurred. *Dexter v. Field*, xxxii. 174.

5. A corporation, summoned as trustees, may disclose by attorney, who need not be a member of the corporation or their general business agent. *Head v. Merrill*, xxxiv. 586.

6. The answers, made by such attorney, are to be considered true, until disproved. *Head v. Merrill*, xxxiv. 586.

7. When such attorney shall have answered all interrogatories put to him, according to his best information and belief, if his statements show that the corporation had no goods, effects or credits of the defendant, and if no opposing proof be introduced, the supposed trustees are to be discharged, although the disclosing attorney had no personal knowledge of the dealings between them and the defendant, but derived his knowledge wholly from the books of the corporation and the statements of their officers. *Head v. Merrill*, xxxiv. 586.

8. It is no valid objection to a trustee's disclosure on *scire facias*, that it was made before a justice of the peace. *Smith v. Eaton*, xxxvi. 298.

9. Whether a trustee, who has suffered a default in the original suit, can, by a disclosure on *scire facias*, take objection to the jurisdiction, *quere*. *Smith v. Eaton*, xxxvi. 298.

10. A trustee, indebted to the principal defendant for his "personal labor," is bound to disclose not only the indebtedness, but also that it accrued for such labor. And if he do not so disclose, a judgment against him, as trustee, will furnish no protection in an action against him by the principal for the services. *Lock v. Johnson*, xxxvi. 464.

11. A corporation, in making a disclosure by their agent in a trustee process, is not concluded by the entries upon their books; if the agent discloses there was a mistake or fraud in the amount of credit reported, and no facts were disclosed showing the contrary, and the debt is larger than the credit as disclosed, the corporation is not chargeable. *Bigelow v. York & C. R. R. Co.*, xxxvii. 320.

12. If one, summoned as trustee, is notified that the debt by him owing has been assigned to a third person, and he neglects to disclose such assign-

ment, the trustee judgment, and payment of it on a legal demand, furnish to him no protection against the claims of the assignee. *Milliken v. Loring*, xxxvii. 408. *Bunker v. Gilmore*, xl. 88.

13. A supposed trustee is under no obligation to disclose transactions disparaging his title to real estate. *Moor v. Towle*, xxxviii. 133.

14. By R. S. of 1841, c. 119, § 79, the Court, in its discretion, for good cause shown, may permit or require a trustee, who has been examined in the original suit, to be examined anew in a suit of *scire facias*. *McMillan v. Hobson*, xli. 131.

15. A trustee, by his disclosure, must distinctly and unequivocally negative the idea that he had funds of the principal defendant in his possession, or he will be charged. *Toothaker v. Allen*, xli. 324.

16. If the trustee, in his disclosure of facts, is vague and unsatisfactory; or if, keeping accounts with the principal defendant, he fails to state them; or if, doing business with him, and not keeping such accounts, he fails to assign a sufficient reason for the neglect, he must be charged. *Toothaker v. Allen*, xli. 324.

17. The general denial of liability by a trustee is in the nature of a plea, and subject to a full subsequent investigation by question and answer. *Toothaker v. Allen*, xli. 324.

### III. WHEN THE TRUSTEE WILL BE CHARGED.

(a) FOR SPECIFIC PROPERTY IN HIS HANDS.

(b) FOR INDEBTEDNESS OR OTHER LIABILITY.

#### (a) *For specific property in his hands.*

18. One, having a lien upon goods with power to sell, and, before they came to his actual possession, being summoned as trustee of the general owner, (the right to take possession having been postponed for a limited period by the lien contract,) will be charged as trustee, if he afterwards take and sell the goods, at a price more than enough to discharge the lien; even though he took negotiable notes for the goods, and held the same unpaid at the time of the disclosure. *Brunswick Bank v. Sewall*, xxxiv. 202.

19. A. placed goods in the hands of B., as collateral security, with power to sell, the surplus avails to be accounted for to A., who then, for the purpose of securing C., in the sum of \$75, gave to C. a draft upon B. for the surplus. B. accepted the draft, and was immediately afterwards summoned as trustee in this suit. He afterwards sold the property, and found the surplus to be \$243.33. He paid the \$75 to C., who, for the benefit of A., the drawer, assigned the balance due on the draft to a third creditor. This third creditor drew an order upon B. for \$125, "to be paid out of the avails of the sale," which B. accepted, "to pay when in funds."—*Held*, that, upon the payment of the \$75, the draft had fulfilled its office; and that B. was chargeable, as trustee, without the right of deducting for his acceptance of the \$125 order. *Brunswick Bank v. Sewall*, xxxiv. 202.

20. In a suit against joint defendants, a person holding goods, effects or credits of either of them, may be held as trustee. *Smith v. Cahoon*, xxxvii. 281.

21. One, who had received personal property from the defendant, giving therefor his obligation to pay a stipulated price or return the property within a prescribed period, is chargeable as trustee, although, when served with the

process, the time for making the election had not expired, and the election had not been made. There is the same liability of the trustee, though the property was but an undivided part of an indivisible article. *Smith v. Cahoon*, xxxvii. 281.

22. An indebtedment to the principal defendant as surviving partner will subject the debtor as trustee, though the suit is against the defendant in his individual character; unless it appears either that the fund is needed for the partnership debts, or that the partnership creditors have taken measures to secure its appropriation. *Smith v. Cahoon*, xxxvii. 281.

23. A trustee is entitled to deduct from the property in his hands, or the proceeds thereof, all sums which he had paid for the principal, and to hold the balance as security for all his outstanding liabilities on the principal's account, and for all his demands against him of which he could avail himself had he not been summoned. He is to be charged only for the balance after an adjustment of their mutual demands. *Stedman v. Vickery*, xlii. 132.

See ASSIGNMENT, 33.

(b) *For indebtedness or other liability.*

24. If a supposed trustee holds goods, effects or credits of the principal defendant, under a conveyance from him which is fraudulent as to creditors, he will be charged, if the fraud was actual, whether the plaintiff was a prior or subsequent creditor. But if the fraud was merely a legal one, he will be discharged unless the plaintiff was a prior creditor. *Fletcher v. Clarke*, xxix. 485.

25. Previous to the Act of 1854, c. 85, the wife's earnings were liable to be reached by the trustee process, in a suit by a creditor of her husband. *Bradbury v. Andrews*, xxxvii. 199.

26. Whether a Railroad Corporation, who have contracted to issue stock certificates to the principal defendant, is chargeable as trustee, *quere*. *Bigelow v. York & Cumberland R. R. Co.*, xxxvii. 320.

27. Although one, summoned as trustee, may declare that he has no goods, &c., of the principal in his hands, yet, if he state facts which are inconsistent with the truth of that declaration and which outweigh it, he is lawfully chargeable. *Moor v. Towle*, xxxviii. 133.

#### IV. WHEN DISCHARGED.

28. Where the principal in a trustee process had purchased land and given back a mortgage to secure his notes for the consideration, and then conveyed one-half of the same, by deed of warranty, to one summoned as the trustee, and received the consideration therefor; and afterwards, (the notes secured by the mortgage remaining wholly unpaid,) the principal conveyed the other half of the land to the supposed trustee, who contracted with his grantor, as the consideration for this conveyance, to pay the notes secured by the mortgage, being then to the full amount of the value of the land, but, at the time of the service of the trustee process, no part of said notes had been paid:—*Held*, that the trustee must be discharged. *Lyford v. Holway*, xxvii. 296.

29. If an action be brought against two persons as partners, and one of the defendants, and two others, as partners in another concern, be summoned as trustees, the latter must be discharged. *Denny v. Metcalf*, xxviii. 389.

30. The contingency which, by the statute, exonerates one from being charged as trustee, is not a mere uncertainty as to how the balance may stand between the principal and the supposed trustee; but is such a contingency as may preclude the principal from any right to call the supposed trustee to settle or account. *Dwinel v. Stone*, xxx. 384. *Williams v. A. & Ken. R. Co.*, xxxvi. 201.

31. The holding of a chose in action, belonging to the defendant, will not charge the holder as trustee. *Clark v. Viles*, xxxii. 32. *Wilson v. Wood*, xxxiv. 123.

32. When the party summoned as trustee has pleaded that he has no goods, &c., unless, &c., his refusal to answer an interrogatory, (the Court having neither ordered, nor having been called upon to order, that he should answer it,) will not charge him as trustee, unless the question have a tendency to elicit some fact relative to the issue. *Lyman v. Parker*, xxxiii. 31.

33. One holding an indorsed promissory note, under an obligation to the principal defendant to account for it, when collected, is not chargeable. *Wilson v. Wood*, xxxiv. 123.

34. Unless a mortgagee of chattels had actual possession of the property, when served with trustee process, he must be discharged. *Pierce v. Henries*, xxxv. 57. *Wood v. Estes*, xxxv. 145. *Mace v. Heald*, xxxvi. 136. *Reggio v. Day*, xxxvii. 314. *Stedman v. Vickery*, xlii. 132.

35. Neither will he be charged, if, prior to service upon him, he had made a sale and transfer of the debt and mortgage. *Wood v. Estes*, xxxv. 145.

36. Nor if, having had possession, the mortgagee, prior to service upon him, surrendered the property to the mortgager. *Wood v. Estes*, xxxv. 145.

37. Though a person may have received the goods of a co-partnership in payment of an individual debt, he will not be held as trustee, in a suit against the firm, unless it appears that the debt was not jointly due from the co-partnership. *Wood v. Estes*, xxxv. 145.

38. One member of a co-partnership cannot truly declare that he had no goods, &c., of the defendant, if the co-partnership had any; but one having so declared, and no interrogatories having been put to him, he must be discharged. *Macomber v. Wright*, xxxv. 156.

39. When one, residing out of the county, is summoned as trustee, and he appears by attorney, and files a declaration that he had not any goods, &c., the declaration, though not sworn to, is to be considered as true, and he will be discharged, unless the plaintiff chooses to proceed further in the examination. *Macomber v. Wright*, xxxv. 156.

40. In certain cases, a trustee may be discharged, if his disclosure show his liability to be doubtful. In cases of *prima facie* liability, dependent upon the facts put in issue, the burden of full proof is upon the trustee. *Butman v. Hobbs*, xxxv. 227.

41. Whether one summoned as trustee is to be charged must depend upon the state of facts existing at the time of service of the trustee process. *Mace v. Heald*, xxxvi. 136. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

42. A party summoned as trustee, while it is contingent whether he will be indebted to the principal defendant, will be discharged. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

43. A corporation had contracted to pay, on a specified day of each month, seventy-five per cent. of the work done by the employee in the preceding

month, upon a stipulation that the balance should be retained as a forfeiture, if the employee should fail to fulfil his part of the contract:—*Held*, that while the employee's part of the contract remains unfulfilled, the contingent twenty-five per cent. is not attachable by trustee process. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

44. Where, by such contract, the value of the whole month's work is to be estimated and certified after the end of the month, before any payment is to be made, no indebtedment for any part of it arises before the month has expired; and, therefore, no part of such value can be secured by trustee process until the expiration of the month. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

45. Property belonging to a resident of N. Brunswick, and there situated, upon his obtaining a certificate of bankruptcy under the laws there, is thereby transferred to his assignee. And, after such transfer, one who had been indebted to the bankrupt cannot be charged as trustee in a suit against him. *Smith v. Eaton*, xxxvi. 298.

46. The holding a mortgage of personal property to secure the mortgagee against a claim for which he is not liable, as well as upon one upon which he is liable, for the mortgager, will not constitute the mortgagee the trustee of the mortgager. *Reggio v. Day*, xxxvii. 314.

47. Where an award has been accepted, and afterwards the party against whom the award was made was summoned as the trustee of the other party to the award;—*Held*, that he must be discharged. *Holt v. Kirby*, xxxix. 164.

48. An administrator, whose intestate gave a negotiable note to defendant, is not chargeable as trustee, though the note may have been presented by the promisee for allowance against the estate. *Commercial Bank v. Neally*, xxxix. 402.

49. If, when service of the writ is made upon an administrator as trustee of the defendant, the latter was surety on sundry notes of the intestate, but had paid nothing, there is no indebtedment of the estate, and the trustee must be discharged. *Commercial Bank v. Neally*, xxxix. 402.

50. Not even an attachment of defendant's property, on suits against him as such surety, would constitute a debt either absolute or contingent against the estate. *Commercial Bank v. Neally*, xxxix. 402.

51. A trustee disclosed that, having become liable for the principal to a large amount, he took, as security, a mortgage of his house and an absolute conveyance of his store, giving back a memorandum to reconvey upon being indemnified:—*Held*, he was not trustee. *Stedman v. Vickery*, xlii. 132.

52. A sale between a supposed trustee and the principal, being without fraudulent intent and valid between the parties, the fact that some of the parties may have incurred penal liabilities for infractions of the revenue laws cannot have the effect to charge the trustee. And even, if the conveyance were fraudulent, the trustee might hold the property to secure his *bona fide* liabilities. *Stedman v. Vickery*, xlii. 132.

53. A supposed trustee is not chargeable for real estate in his possession, the property of the principal debtor. *Plummer v. Rundlett*, xlii. 365.

54. A., summoned as trustee of B., disclosed, that, prior to the service upon him, he had sent B., (his son-in-law,) a check for \$500, and had afterwards taken a note therefor; but that he intended it as a gift to his daughter, and had never designed to call for the payment of the note:—*Held*, that,

having been intended as a gift, and, having been so regarded by the parties at the time, they could not afterwards change the nature of the transaction so as to affect the rights of third parties. *Plummer v. Rundlett*, XLII. 365.

55. A.'s wife tendered to B. a sum of money, to redeem real estate which the latter held by mortgage, as security for certain notes given by A., the wife claiming that the money was the fruits of her earnings. It not having been accepted, it was deposited by her in the hands of C., subject to the order of the mortgagee, or herself, in which condition it remained at the time C. was summoned as trustee of A.:—*Held*, that C. must be discharged. *Mayhew v. Paine*, XLII. 296.

See ASSIGNMENT, 8.

## V. EFFECT, AS BETWEEN THE PRINCIPAL AND TRUSTEE.

56. A judgment against a trustee will not operate as a bar against an action by the principal defendant, unless a demand for the goods, &c., had been made, within thirty days, from the judgment, by an officer holding the execution. Nor unless the trustee had delivered or accounted for the goods, &c., upon the judgment. *Bachelder v. Merriman*, XXXIV. 69.

## VI. PRACTICE.

57. *It seems*, that, where a debtor holds a joint contract against two or more, and his creditor would attach it by trustee process, he must summon all the parties liable by law to discharge it, who reside in this State. *Hutchinson v. Eddy*, XXIX. 91.

58. A trustee, who does not disclose at the first term, is not entitled to costs arising at any subsequent stage of the case. *Warren v. Gibbs*, XXIX. 464.

59. The adjudication of the Judge of the District Court, as to the facts in a trustee process, is conclusive. *Fletcher v. Clarke*, XXIX. 485.

60. But the adjudication of such Judge, upon the answers of one summoned as trustee, respecting the deposit with him by the principal defendant, of a negotiable note, and of his liability to account for the same, is not of that class, in which his adjudication is conclusive. *Wilson v. Wood*, XXXIV. 123.

61. In this process, upon exceptions to the rulings as to the supposed trustee's chargeability, this Court must examine the disclosure, in order to decide the preliminary statute question, whether "justice requires a revision." *Head v. Merrill*, XXXIV. 586.

62. The Act of 1849, c. 117, does not authorize the introduction of new testimony, in this Court, in trustee processes brought here by exceptions from the District Court. It was designed merely to test the correctness of the District Judge, in his adjudications as to matters of fact, upon the evidence before him. *Wood v. Estes*, XXXV. 145.

63. When one, who resides out of the county, is summoned as trustee, he is entitled to the benefit of R. S. of 1841, c. 119, § 27, although he is a member of a co-partnership whose place of business is within the county, and although all its members were summoned as trustees. *Macomber v. Wright*, XXXV. 156.



64. In this process, an issue of fact for the jury may be formed under some circumstances, between the plaintiff and the trustee. And, in the pleadings, forming such an issue, the granting of amendments is at the judicial discretion of the Court. *Butman v. Hobbs*, xxxv. 227.

65. If an insurer, after a loss of the property by fire, be summoned as trustee of the insured, and he plead that the property was burnt by design, or gross carelessness, the evidence to establish the burning by design must satisfy the jury beyond reasonable doubt; and to establish the burning by gross negligence, there would be stronger reason, requiring full proof. *Butman v. Hobbs*, xxxv. 227.

66. Upon money in the hands of one adjudged trustee, interest is taxable against him from the time of demand upon him. *Williams v. A. & K. R. R. Co.*, xxxvi. 201.

67. In some cases, a defendant in one suit may be sued in another suit as trustee of the person who was plaintiff in the former suit. *McAllister v. Furlong*, xxxvi. 307.

68. Such suit, against the defendant as trustee, operates as an attachment of the fund in his hands; and, after such attachment has expired, the trustee suit cannot delay or impair the right of the plaintiff in the original suit in obtaining judgment and execution against the defendant. And such an attachment expires, unless, within thirty days from the judgment, a demand on the execution be made upon the trustee. *McAllister v. Furlong*, xxxvi. 307.

69. There is no statute or rule of practice which prescribes what interrogatories shall be propounded to one summoned as trustee, or what shall be answered. The trustee, in refusing to answer, acts at his peril. Per SHEPLEY, C. J. *Smith v. Cahoon*, xxxvii. 281.

70. In *scire facias* against a trustee, the plaintiff cannot recover judgment for more than appears to be due on the execution issued on the original judgment. And where such execution appears to be satisfied in part, by a levy upon the property of the debtor, evidence is inadmissible to show that such property did not in fact, belong to the debtor, and that the value of it had been refunded to the real owner. *Sawyer v. Lawrence*, xl. 256.

71. The Court, in its discretion, may allow a supposed trustee to withdraw a bill of exceptions, filed at a previous term, to the ruling of the Court adjudging him trustee, and give him leave to disclose further. *Stedman v. Vickery*, xlii. 132.

72. The question, whether the conveyances disclosed are void for any cause, cannot be determined upon exceptions to the judgment of the Court upon the disclosure. *Stedman v. Vickery*, xlii. 132.

73. Under R. S. of 1841, c. 119, § 33, the allegations must be clear and distinct, setting forth the "other facts" to be proved. An allegation that a certain sale by the principal to the trustee was fraudulent or without consideration, when the trustee has disclosed the circumstances and the consideration, and when no "facts" to be proved by the plaintiff are disclosed, is insufficient. *Stedman v. Vickery*, xlii. 132.

74. If the plaintiff would avail himself of goods mortgaged to the supposed trustee, he must apply to the Court for an "order and decree," in accordance with R. S. of 1841, c. 119, § 58. These provisions are not applicable, however, to such goods as have been sold by trustee. *Stedman v. Vickery*, xlii. 132.

75. The disclosure of a trustee is to be taken as true by the Court; and

the affirmative statements therein are to receive full credit, unless other facts and circumstances disclosed are inconsistent therewith. *Stedman v. Vickery*, XLII. 132. *Plummer v. Rundlett*, XLII. 365.

See ABATEMENT, 1.  
PLEADING, 26.

## VII. GENERALLY.

76. Persons summoned as trustees of the principal defendant are parties to the suit; and adverse to the plaintiff. *Denison v. Benner*, XXXVI. 227.

## TRUSTS.

1. Where a conveyance of land is made by absolute deed, with a written contract back, promising to sell the land at a certain time, and pay two notes with the proceeds, and return the surplus to the grantor, the grantee holds the land in trust; and it is his duty to sell at the time specified, and appropriate the proceeds as agreed. *Pratt v. Thornton*, XXVIII. 355.

2. And if a third person be a surety on one of the notes, although he knew not of the trust when it was undertaken, yet when he was informed of it and could enforce its execution, the original parties cannot annul it. *Pratt v. Thornton*, XXVIII. 355.

3. If there should be a mortgage upon the estate, the trustee may pay it off, and the amount paid will be a charge upon the estate. *Pratt v. Thornton*, XXVIII. 355.

4. The trustee cannot become the purchaser of the trust estate in equity; and the *cestui que trust* may avoid any purchase of the trust estate, made by the trustee. *Pratt v. Thornton*, XXVIII. 355.

5. If, pending a suit, in which land has been attached, the plaintiff assign the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust. And, if the assignment be stated in the appraiser's certificate, it is notice of the trust to any attaching creditor. *Warren v. Ireland*, XXIX. 62.

6. Whether such creditor, without notice, actual or implied, could hold the land discharged of the trust, by levying it as the property of the assignor, *quere*. But, with such notice, he could hold only subject to the trust, and could not maintain a writ of entry against the grantees of the *cestui que trust*. *Warren v. Ireland*, XXIX. 62.

7. If one purchases an estate with his own money, and the deed be taken in the name of another, a trust results by presumption of law, in favor of him paying the money. *Baker v. Vining*, XXX. 121. *Buck v. Swazey*, XXXV. 41. *Dwinel v. Veazle*, XXXVI. 509.

8. Such payment may be proved by parol; but the Court will require the proof to be full, clear and convincing. *Baker v. Vining*, XXX. 121. *Richardson v. Woodbury*, XLIII. 206.

9. Where money has been paid by two or more, and the proportion of each is uncertain, no trust can be established. *Baker v. Vining*, XXX. 121.

10. The presumption of a resulting trust may be rebutted by parol testimony. *Baker v. Vining*, xxx. 121.

11. A devise of the care and management of land and of the disposition of its income, during the life of the devisee, for the benefit of another, confers upon the devisee a life-estate, in trust. *Butterfield v. Haskins*, xxxiii. 392.

12. In equity, contracts for the sale of land are treated as executed. The purchaser is regarded as owning the land, and the vendor, the purchase money, and as seized of the land in trust for the purchaser. And such a trust attaches to the land, and binds every one claiming through the vendor with notice. *Linscott v. Buck*, xxxiii. 530.

13. In the creation of a trust, no exact form of words is requisite. *Buck v. Swazey*, xxxv. 41. *Bragg v. Paulk*, xlii. 502.

14. Lands conveyed to one, but purchased with funds belonging jointly to himself and another, are held by the grantee in trust for the other, to the extent of his part of such funds. *Buck v. Swazey*, xxxv. 41.

15. In order to create a trust by the purchase of lands with the funds of another, they must have been advanced and invested at the time of the purchase. *Buck v. Swazey*, xxxv. 41.

16. Where one, as *cestui que trust*, having the right to compel a conveyance of land to him by his trustee, becomes himself, by contract, the trustee of another in the same land, he is compellable to convey to his *cestui que trust*, so soon as he shall obtain a conveyance. *Buck v. Swazey*, xxxv. 41.

17. A testator gave to his wife certain property for her own use; also his homestead farm, for her natural life, "as a home for herself and their children;" also, the income of all his estates, to be paid to her, as she should require, for her support and the support and education of their minor children, with a further direction, that if there should be a surplus of income for any year, after supplying the wants of his wife, it should be invested by his trustee as a fund, from which to make up the deficiency of income of any subsequent year, and the residue of the fund to be distributed among the children after coming of age:—*Held*, that it is for the wife to adjudge how much of the income is requisite for the support of herself and children; and that the trustee is bound to pay to her the whole income if she request it; and *held*, also, that she is to hold such income in trust, and that the guardian of the children, by application to the equitable jurisdiction of the Court, may prevent any waste or misapplication by her. *Cole v. Littlefield*, xxxv. 439.

18. It is not material in what manner payment was made to the grantor for an estate conveyed in trust, if it was sufficient to induce him to convey. *Dwinel v. Veazie*, xxxvi. 509.

19. A trust, though secret, is not conclusive evidence of fraud, as to the creditors of either grantor or grantee. It is open to explanation. *Brown v. Lunt*, xxxvii. 423.

20. Although a party cannot be compelled to execute a parol trust, he may do it voluntarily, and his creditors cannot object. And when a deed, executed in part fulfillment of a parol trust, and in part for a valuable consideration, good upon its face, is attempted to be impeached, parol evidence is admissible to show the real consideration on which it was executed. *Brown v. Lunt*, xxxvii. 423.

21. Whatever right the king had, by royal prerogative, in the shores of the sea or navigable rivers, he held as a *jus publicum*, in trust for the benefit of the people, for the purposes of navigation and of fishery. *Moulton v. Libbey*, xxxvii. 472.

22. Where the funds of a voluntary association are put under the control and management of trustees, and loaned to some of its members, an action may be maintained in the name of the trustees, though all the parties of record are members of the same association. *Pierce v. Robie*, xxxix. 205.

23. And where the trustees, who had taken a note as such, for such a loan, had been superseded by others, the latter may prosecute a suit on such note, at the request of the association, in the name of the former; and the plaintiffs of record cannot release or control it. But they may require indemnity against costs. *Pierce v. Robie*, xxxix. 205.

24. When the grantee takes a conveyance of the land which an obligor has bound himself by bond to convey to another, with notice, he will be regarded as holding the same in trust for such obligee. *Bragg v. Paulk*, xlii. 502.

25. A declaration in writing, under seal, that A. has purchased a tract of land, subject to mortgage, for the joint and equal benefit of himself and B.; that he has advanced the purchase money and taken a conveyance to himself of the same, as security for his advances and interest therein; that he will apply all the profits of the same to the payment of his advances and of the mortgage of the land; and that, upon payment of the same, he will convey to B. half of the land thus purchased, and equally divide the profits, if any, with him, is a declaration of trust. *Bragg v. Paulk*, xlii. 502.

26. These facts, appearing in the conditions of a bond between the parties, constitute a declaration of trust, in which the obligor is trustee and the obligee the *cestui que trust*. *Bragg v. Paulk*, xlii. 502.

27. By R. S. of 1841, c. 91, § 33, such a declaration of trust is to be recorded in the registry of deeds of the district where the land is; and the record is "equal to actual notice thereof to all persons claiming under a conveyance, attachment or execution, made or levied after such recording." *Bragg v. Paulk*, xlii. 502.

28. When the grantor in a deed, absolute in its terms, makes the conveyance to secure a debt due from him to the grantee, a resulting trust arises by implication of law. And if, when the debt becomes due, or within a reasonable time thereafter, the amount is paid or tendered in payment, the grantee may be compelled to reconvey. *Richardson v. Woodbury*, xliii. 206.

29. Or if, before the debt becomes due, the grantee sells the estate for more than the sum due him, the excess may be recovered in assumpsit. *Richardson v. Woodbury*, xliii. 206.

30. But when the time specified for the payment of the whole debt secured by the conveyance has expired, or a reasonable time, where no specific time is named, the estate becomes absolute in the grantee discharged of the trust. *Richardson v. Woodbury*, xliii. 206.

See BAILMENT, 10.

BANK, 2.

EQUITY, 107—119.

## USAGE.

See BILLS, 77. EVIDENCE, 227—231. INSURANCE, 81. PRACTICE, 63.

## USE AND OCCUPATION.

See LANDLORD AND TENANT, 35—39.

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## USER.

See EASEMENT. PRESCRIPTION. WAY.

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## USURY.

- I. WHAT IS USURY, AND ITS EFFECTS UPON CONTRACTS.
  - II. REMEDY.
  - III. EVIDENCE.
- 

## I. WHAT IS USURY, AND ITS EFFECTS UPON CONTRACTS.

1. If the maker of an usurious note procure a third person, having no connection with it, to give his note for the amount, in payment of the usurious note, such third person cannot avoid his note, on account of the usury between the former parties. *Stanley v. Kempton*, xxx. 118.

2. But *aliter*, if it had been given in renewal or substitution of the original. *Stanley v. Kempton*, xxx. 118.

3. A note given for interest above the rate of six per cent. per annum, for the forbearance of payment of a sum of money, is without legal consideration. *Goodrich v. Buzzell*, xl. 500.

## II. REMEDY.

4. Debt is a proper form of action to recover back money paid as usurious interest. *Houghton v. Stowell*, xxviii. 215.

5. Under R. S. of 1841, c. 69, the person paying usurious interest may recover it back. *Houghton v. Stowell*, xxviii. 215.

6. To a promissory note, the defence of usury, by the oath of the defendant, can only be made in a suit brought in the name of the payee. The plaintiff, who is the indorsee of the note declared on, cannot be called by the defendant to testify, though he was the subscribing witness. *Cushman v. Downing*, xxix. 459.

7. Where a judgment has been recovered upon a note, for its full amount, the debtor, after having paid the execution, is precluded by the judgment from recovering back the illegal interest included in the note. *Footman v. Stetson*, xxxii. 17.

8. Where, upon a promissory note, the plaintiff has received from the defendant interest above the rate of six per cent. per annum, the defendant, in

a suit upon the note, or upon the mortgage to secure the note, may have such excess deducted. *Larrabee v. Lambert*, xxxii. 97.

9. The privilege of swearing to usury in a contract is personal to the party who alleges it. Hence, where one of two defendants in a suit upon a note is defaulted, he cannot be a witness to prove usury in the contract. *Thornton v. Blaisdell*, xxxvii. 190.

10. Banking corporations are subject to the general statute as to usury, as modified by the Act relating to Banks; and when, in discounting paper, a greater rate than the legal interest is taken or reserved by the bank, such excess only can be avoided in an action by it upon the paper. And when the paper, on which illegal interest is taken, was made for the accommodation of the borrower, and this was known to the bank, the defence of usury is available to the parties to the paper, as to such excess. *Veazie Bank v. Paulk*, xl. 109.

11. Banking corporations are liable to the same penalties as individuals for taking usurious interest. *Lumberman's Bank v. Bearce*, xli. 505.

### III. EVIDENCE.

12. The defendant, being the maker of a negotiable note, will not be permitted to prove usury by his own oath in defence, where the suit is brought by an indorsee. *Myrick v. Hasey*, xxvii. 9. *Cushman v. Downing*, xxix. 459.

13. Under Act of 1846, c. 192, the proof of usurious interest, which affects the costs in a suit, must be adduced at the trial. *Hankerson v. Emery*, xxxvii. 16.

## VARIANCE.

When the defendant omits to plead abatement for the omission of a defendant, who ought to have been joined, in an action founded on a joint contract, though the obligation be in writing, and the declaration show it to have been made by a party not joined, it is no variance at the trial. *Reed v. Wilson*, xxxix. 585.

See PLEADING, 25, 26, 27, 46, 47.

## VENUE.

1. In local actions, if the venue be in the wrong county, and the objection appear on the record, it should be taken advantage of on demurrer. After pleading to the merits, and after verdict, it is too late to raise the objection. *Heath v. Whidden*, xxix. 108.

2. In criminal pleading, the venue must appear to be within the jurisdiction of the Court. *State v. Conley*, xxxix. 78.

## VERDICT.

- I. WHEN IT MAY BE AFFIRMED, AND WHAT MAY BE SUSTAINED.
- II. WHEN IT MAY BE AMENDED.
- III. WHEN IT MAY BE SET ASIDE FOR ERROR OR MISCONDUCT OF JURY.

## I. WHEN IT MAY BE AFFIRMED, AND WHAT MAY BE SUSTAINED.

1. In tort, wherein the defendants have severally pleaded the general issue, a verdict which finds one of them to be "not guilty," and is silent as to the others, may be received and affirmed. *Thacher v. Jones*, xxxi. 528.

2. In a civil suit, on an issue received and discussed by the jury on Saturday, their verdict may be affirmed and recorded on the next Court day, though it was finally agreed upon and sealed up on the morning of Sunday. *True v. Plumley*, xxxvi. 466.

3. On an indictment for an assault with a dangerous weapon, A. B., with intent to kill and murder, a general verdict of "guilty" is sustainable. *State v. Waters*, xxxix. 70.

4. A verdict in favor of one of two defendants, and silent as to the other, may be received and affirmed, in assumpsit as well as in tort. *Shapleigh v. Abbott*, xli. 173.

5. When there are several counts, and the jury find the defendant guilty on one count, and are silent as to the rest, the legal effect of the verdict is an acquittal as to the other counts. *State v. Phinney*, xlii. 384.

## II. WHEN IT MAY BE AMENDED.

6. When a verdict has been returned, affirmed and constructively recorded, the jury's power and duties in relation to it, have been fully performed and exhausted. And any re-consideration by the jury, of such a verdict, though by order of the Court, is inoperative; and any alteration in it, made upon such re-consideration, is void. *Snell v. Bangor S. N. Co.*, xxx. 337.

7. Where, in a verdict, the jury accidentally omitted to insert the amount of damages which they had agreed upon:—*Held*, that the Court might authorize the jury to insert the amount, though, after having sealed it up, they had separated for the night by leave of the Court. *Doe v. Scribner*, xxxvi. 168.

8. A verdict will not be set aside because the jury, by consent of parties, having sealed up their verdict and separated for the night, were allowed, after the same was read by the clerk on the following morning, to amend it so as to conform to the real finding; although, by so doing, the verdict became one against instead of in favor of the plaintiff. *Beal v. Cunningham*, xlii. 362.

## III. WHEN IT MAY BE SET ASIDE.

9. Where the defendant pleads the general issue with a brief statement, and both are signed by his counsel, and the plaintiff's counsel makes and signs a counter brief statement, but accidentally omits to join the general

issue, the verdict will not be set aside for this reason. *Stevens v. Bachelor*, xxviii. 218.

10. Jurors are not allowed to testify as to their mode of computation, for the purpose of setting aside the verdict, when misconduct is not alleged. *Hovey v. Luce*, xxxi. 346.

11. A verdict will not be set aside, because one of the jurors, without being in the charge of an officer, was permitted by the Court, when not in session, to absent himself temporarily from the panel, before the verdict was agreed upon, unless some prejudice appears to have been suffered by the moving party. *Parsons v. Huff*, xxxviii. 137.

12. Nor because of the temporary absence of a juror from the jury room, without permission of the Court, when there is no proof of misconduct on his part with reference to the cause on trial. *Milo v. Gardiner*, xli. 549.

See ACCESSORY, 4.

NEW TRIAL.

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## VESSELS.

See SHIPPING.

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## VOLUNTARY ASSOCIATION.

See PARTNERSHIP, 9. TRUSTS, 22, 23.

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## VOLUNTARY PAYMENT.

1. When money claimed as rightfully due is paid voluntarily and with a full knowledge of the facts, or with the means of knowledge, it cannot be recovered back, if the party to whom it has been paid may conscientiously retain it. *Smith v. Readfield*, xxvii. 145. *Gooding v. Morgan*, xxxvii. 419. *Fellows v. Fayette*, xxxix. 559.

2. The payment of a tax, which may conscientiously be retained, with a full knowledge of all the facts, after one has been arrested for its non-payment and discharged on his promise to pay it, is voluntary, and cannot be recovered back, notwithstanding informalities in its assessment. *Fellows v. Fayette*, xxxix. 559.

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## WAGES.

See REGULATIONS, &c. SHIPPING, 28—34.



WAIVER.

1. When a party has voluntarily surrendered a right which he could have asserted, he shall not avail himself of it afterwards, to the prejudice of his adversary. *Knowlton v. Homer*, xxx. 552.

2. Where defendant told the plaintiff to "call on me on Thursday, and if I find there is no claim on the vessel, I will pay you then;" and the plaintiff did not call, and there was no evidence that the defendant had found that there was no claim on the vessel:—*Held*, this could not be considered a waiver on the part of the defendant. *Carle v. Bearce*, xxxiii. 337.

3. The defendant's taking depositions in vacation to prove the defence, pending a motion by him to dismiss the action, is not an abandonment of the motion, or a waiver of the ground upon which it had been presented. *Briggs v. Davis*, xxxiv. 158.

4. By pleading the general issue to the declaration, the defendant waives all benefit of a demurrer previously filed. *True v. Plumley*, xxxvi. 466.

5. So, where he appears and pleads to the merits of a suit, he thereby waives any objections to the want of service of the writ. *Woodman v. Smith*, xxxvii. 21.

6. So, also, he waives any technical objections that may exist to the maintenance of the action, by an agreement in writing with the plaintiff in interest, as to the final disposition of the suit against him in court. *Cushing v. Babcock*, xxxviii. 452.

7. A motion to quash a petition for review, for want of an indorser, must be made within the first two days of the term next after notice to the respondent, or such an objection will be considered as waived. *Smith v. Davis*, xxxviii. 459.

8. A release under seal by the judgment debtor, of land set off on execution to the judgment creditor, is a waiver of any defects in the levy, and confirms the title in the land to the creditor. *Freese v. McIntire*, xl. 148.

9. A waiver in writing of strict performance of a specialty must clearly appear. It must be the act of the party having something to waive, and not of the party pleading it. *Haynes v. Fuller*, xl. 162.

10. The performance of a contract under seal cannot be waived by a parol executory agreement. *Haynes v. Fuller*, xl. 162.

11. But, where the performance of the condition of a bond is limited to ten days, by the instrument, and an agreement made on good consideration to waive the performance as to time is proved, but no time fixed for the performance; in determining what is a reasonable time, regard must be had to the original contract; and forty days delay would be too late. *Haynes v. Fuller*, xl. 162.

12. When a plea in abatement is overruled by the presiding Judge, the general issue pleaded, and the cause subsequently reported for the consideration of the whole Court upon the evidence, without any stipulation as to the preliminary plea, it is considered as waived. *Plantation No. 9 v. Bean*, xl. 218.

13. A waiver, subsisting entirely in contract, cannot be available if the contract is invalid. *Fisher v. Shaw*, xlii. 32.

14. Property, agreed to be paid for on delivery, having been delivered

without requiring payment, the right to payment at the time of delivery must be taken to be waived, and the time of payment left to be arranged by the parties. *Rice v. McLarren*, XLII. 157.

15. The objection that the docket entry is received, instead of a copy of the judgment, must be specifically made when offered, or it will be regarded as waived. *Fitzgibbon v. Brown*, XLIII. 169.

See ABATEMENT, 22—26.

ACTION, 11.

ARBITRATION, 3.

BILLS, &c., 76, 81.

CONTRACT, 53, 57.

DEPOSITION, 16, 34—42.

PLEADING, 27.

## WARD.

See GUARDIAN AND WARD.

## WARRANT AND SEARCH WARRANT.

1. A warrant, issued by one as a justice of the peace, purporting to be founded on a complaint sworn to before him, furnishes of itself a legal presumption of his authority. *State v. McNally*, XXXIV. 210.

2. A magistrate's warrant of commitment must show his jurisdiction to issue it. *Gurney v. Tufts*, XXXVII. 130.

3. Under the Acts of 1851 and 1853, unless a magistrate's search warrant to search a dwellinghouse, for liquors alleged to be kept for illegal sale, shows that, before issuing such warrant, the testimony of three witnesses, &c., was taken in writing and verified by oath, declaring that they had reasonable ground, &c., it is void. *State v. Staples*, XXXVII. 228. *State v. Carter*, XXXIX. 262.

3. And it must show that the witnesses swore that they had reasonable ground to believe that such liquors were kept in such dwellinghouse for illegal sale, or it will be void. *State v. Spencer*, XXXVIII. 30.

4. When no cause for issuing the warrant is expressed therein, there is no question as to the want of jurisdiction, whether it is *in personam* or *in rem*. *Thurston v. Adams*, XLI. 419.

See COLLECTOR, 10.

OVERSEERS, &c. 5.

## WARRANTY.

See SALE, 42—51.

## WASTE.

1. By R. S. of 1841, c. 129, one, having the next immediate estate of inheritance, may maintain an action of waste, against a tenant for life, who suffers or commits any waste on the premises. *Hunt v. Hall*, xxxvii. 363.

2. No such action can be maintained by one having only a contingent remainder. *Hunt v. Hall*, xxxvii. 363.

3. A testator devised land to his wife during her life, and, at her decease, to be divided among his children, and the heirs of such as may be deceased: *Held*, that the remainder, after the termination of the wife's life estate, was contingent until her death. *Hunt v. Hall*, xxxvii. 363.

4. In a writ of entry, the question whether a life estate in the premises has been forfeited on account of waste cannot be considered. *Quimby v. Dill*, xli. 528.

Sec LANDLORD AND TENANT, 33.

## WATER POWER.

1. In an action by A., owner of a saw-mill, to recover damages of B. alleged owner or occupant of another mill, situated on the opposite side of the same river; and supplied with water from the same source, for diverting water from the mill of A., the ownership or actual occupancy of B., must be proved, or the suit cannot be maintained. *Sidelinger v. Hagar*, xli. 415.

2. When hydraulic works are erected on both banks of a private stream, if there is not sufficient water to afford a full supply for all, each riparian proprietor is entitled to an undivided half, or other proportion, of the whole bulk of the stream. *Jordan v. Mayo*, xli. 552.

3. The owner of an entire water power on the falls of a river not navigable, with the dam and the different erections dependent thereon, having conveyed certain portions of the premises, to wit, the carding and clothing building, and the land upon which they stood, "with the privilege of drawing water from the flume connected with said building, sufficient for all the purposes of clothing and carding; and when there shall not be sufficient water for all the mills erected, or to be erected on said flume and privilege, the said clothing and carding privilege is in all cases to have the preference;" — *Held* that, neither the owner, nor any person claiming under him by subsequent grant, by virtue of ownership of the shore opposite the premises first granted, could draw off the water so that there should not be sufficient to meet the purposes of the grant; and also *held*, that the words in the grant, "erected on said flume and privilege," did not restrain those of the preceding clause, so as to enable the grantor, or his assigns, to draw as much water for the mills on the other side of the stream, and not through the same flume, as they might choose. *Jordan v. Mayo*, xli. 552.

4. The grant by the owner of the whole stream of water, sufficient for a given purpose, precludes the grantor and his assigns from diminishing or defeating in any way what he has thus conveyed. *Jordan v. Mayo*, xli. 552.

## WAY.

- I. GENERALLY, AND HEREIN OF RIVERS AND STREAMS.
- II. COUNTY ROADS OR HIGHWAYS.
- III. TOWN OR PRIVATE WAYS.
- IV. DAMAGES FOR LAYING OUT AND ALTERING.
- V. DISCONTINUANCE.
- VI. MAKING.
- VII. DEFECTS AND OBSTRUCTIONS.
- VIII. LAW OF ROAD.
- IX. WAYS OTHER THAN BY STATUTE, AND RIGHT OF WAY.
- X. WAYS IN UNINCORPORATED PLACES.
- XI. SURVEYORS OF HIGHWAYS.

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I. GENERALLY, AND HEREIN OF RIVERS AND STREAMS.

1. The fee in lands, reserved for public range ways, remains in the original proprietors, until they part with it. *Small v. Pennell*, xxxi. 267.

2. In trespass for opening a road over the plaintiff's land, proof of the reservation of such range way over the *locus in quo* furnishes no defence. *Small v. Pennell*, xxxi. 267.

3. Over such range ways, an easement may be acquired by ways, legally laid out, or by long user. Such range ways, as to the right of the public to the use of them, are to be viewed as any other lands. *Small v. Pennell*, xxxi. 267.

4. In a public highway, located, but not finally established, individuals can have no vested rights, however advantageous to them such a way might be. *Williams v. Lincoln Co. Comm'rs*, xxxv. 345.

5. The use of the shore of the Penobscot river, as a way for travel, is the exercise of a right which the owner of the shore cannot abridge or restrict. When the river is covered with ice, his rights and those of the public remain unchanged. Citizens may still traverse the river at pleasure. *State v. Wilson*, xlii. 9.

6. The public, as foot passengers, have the right to use the carriage way as well as the sidewalks. Walking in the carriage way is not of itself *prima facie* evidence of want of ordinary care; nor from that fact alone will the law infer negligence. *Coombs v. Purrington*, xlii. 332.

## II. COUNTY ROADS OR HIGHWAYS.

- (a) AUTHORITY TO LAY OUT.
- (b) PRELIMINARY PROCEEDINGS.
- (c) PROCEEDINGS IN LAYING OUT.
- (d) APPEAL.

(a) *Authority to lay out.*

See COUNTY COMMISSIONERS, 63, 66.

(b) *Preliminary proceedings.*

7. A petition for the location of a county road is sufficiently definite, if it sets forth its *termini*, and the general course between them. And where alternative places are described, it furnishes no valid objection. *Sumner v. Oxford Co. Comm'rs*, xxxvii. 112.

See CERTIORARI, 7.

COUNTY COMMISSIONERS, 10, 19, 41, 42, 48, 49.

(c) *Proceedings in laying out.*

8. The Commissioners are not required to follow minutely the line indicated in the petition; but a substantial compliance with it, under the exercise of a sound discretion, is sufficient. *Wayne v. Kennebec Co. Comm'rs*, xxxvii. 558.

See CERTIORARI, 24, 25.

COUNTY COMMISSIONERS, 11, 13, 16, 28, 34, 57.

(d) *Appeal and proceedings.*

9. The Act of 1847, c. 28, § 3, requires the report of committees to be made at the term of the District Court next after their appointment. And, unless made then, a subsequent acceptance of their report will be void. *Windham, petr's.*, xxxii. 452.

See COUNTY COMMISSIONERS, 23, 24, 26, 55, 56, 72.

## III. TOWN OR PRIVATE WAYS.

(a) PROCEEDINGS AND RETURN OF SELECTMEN.

(b) ACCEPTANCE.

(c) APPEAL AND PROCEEDINGS.

(a) *Proceedings and return of selectmen.*

10. Proof that a part of the proceedings, for the establishment of a town road, were legally conducted, will authorize a jury, after the lapse of thirty years, to infer that all the other requisites of the law were complied with. *State v. Bigelow*, xxxiv. 243. *Bigelow v. Hillman*, xxxvii. 52. *Gibbs v. Larrabee*, xxxvii. 506. *Brock v. Chase*, xxxix. 300.

11. That a land owner had due notice of the selectmen's meeting to locate a town way, may be inferred from a notification seasonably inserted in a newspaper published in his neighborhood. *State v. Beeman*, xxxv. 242.

12. If the return of the selectmen omit to state that their notices were posted "in the vicinity of the proposed route," the Court cannot determine the road to have been legally established. *Southard v. Ricker*, xliii. 575.

(b) *Acceptance.*

13. A way, by dedication of the owner of the land, does not become a

public highway, without user for twenty years, or an acceptance on the part of the town. *State v. Bradbury*, XL. 154.

14. Repairs made upon it, by a surveyor of highways, do not constitute such acceptance. He has no authority to bind the town. *State v. Bradbury*, XL. 154.

(c) *Appeal and proceedings.*

15. A town cannot be adjudged to have delayed or refused to approve and allow a supposed way, where there had been no proper return or report of the laying of such way by the selectmen. *Lewiston v. Lincoln County Commissioners*, XXX. 19.

16. County Commissioners cannot act on a petition, representing that a town has unreasonably refused or delayed to allow and approve a town way legally laid out, and praying that the commissioners accept and approve it, unless the petition or the record of the Court shows that the application was seasonably made to them. *Bethel v. Oxford Co. Commissioners*, XLII. 478.

See COUNTY COMMISSIONERS, 20, 21, 64, 65, 68, 69, 70.

#### IV. DAMAGES FOR LAYING OUT AND ALTERING.

17. Whether the applicant for damages, occasioned by the location of a town way, is or is not the owner of the land, is one of the questions to be determined by the jury or committee on the hearing of the parties on such application. *Minot v. Cumberland Co. Commissioners*, XXVIII. 121.

18. Where an existing street or road is dug down to the injury of the owner of land adjoining, it is not an alteration within the meaning of the statute, which will entitle him to damage. *Hovey v. Mayo*, XLIII. 322.

See CERTIORARI, 2.

COUNTY COMMISSIONERS, 2, 9, 33.

#### V. DISCONTINUANCE.

19. The mere use by the public of a town way, for many years, will not divest the town of its jurisdiction over it. *Bigelow v. Hillman*, XXXVII. 52. *Larry v. Lunt*, XXXVII. 69.

20. An unrestricted vote to discontinue a town way takes effect from its passage; though the meeting, at which it passed, may be adjourned to a subsequent day. *Bigelow v. Hillman*, XXXVII. 52.

21. Whether such vote can be reconsidered, after the rights of third parties have intervened, *quere*. *Bigelow v. Hillman*, XXXVII. 52.

22. A town way, which had its origin and continuance by virtue of a legal location, may be discontinued, although used for more than twenty years. *Larry v. Lunt*, XXXVII. 69.

23. It is not necessary, in order to prevent the discontinuance of a highway by operation of R. S. of 1841, c. 25, § 42, that it should be in such a state of repair as not to be subject to indictment. *State v. Cornville*, XLIII. 427.

## VI. MAKING.

24. The contractors with a town to make and open a county road, which it is obligatory upon the town to build, are not restricted in reference to suitable means in which to effect their object, provided opportunity is given to the owner of land over which it passes, to take from the land such things as he has a legal right to. *Wight v. Phillips*, xxxvi. 551.

25. A road cannot be said to be "opened," when nothing has been done to a large portion of it, and the remainder was a road open and used as such before. *State v. Cornville*, xliii. 427.

26. A highway located, and no work done on a large portion thereof, and having been put to no use as a way, for more than six years after it should have been made passable, cannot be treated as opened. *State v. Cornville*, xliii. 427.

See COUNTY COMMISSIONERS, 52.

## VII. DEFECTS AND OBSTRUCTIONS.

- (a) DAMAGES TO PERSONS AND PROPERTY INJURED.
- (b) INDICTMENT.
- (c) OBSTRUCTIONS BY INDIVIDUALS.

(a) *Damages to persons and property injured.*

27. The plaintiff, traveling with a hired horse, which was entirely ruined through a defect in the highway, paid its value to the owner. In his damages recovered of the town, it was held, that the value of the horse was rightfully included. *Littlefield v. Biddeford*, xxix. 310.

28. In a suit against a town for damage through a defect in the road, the plaintiff, to account for the violence of his horse, may show that near the defect where the injury occurred was another defect in the road, which he had just passed without injury. *Verrill v. Minot*, xxxi. 299.

29. If a traveler's horse, without fault of the town, should be running violently upon the road, it cannot be ruled, as a matter of law, that the town is not responsible for an injury sustained by the traveler, through a defect in the road, though it might not have occurred but for such running. *Verrill v. Minot*, xxxi. 299.

30. In such action, bodily pain is a part of the injury for which damage may be recovered. *Verrill v. Minot*, xxxi. 299. *Mason v. Ellsworth*, xxxii. 271.

31. To maintain such a suit against a town, it must be proved that the highway was not safe and convenient; that the plaintiff exercised ordinary care; and that the injury was occasioned by the defect alone. *Moore v. Abbott*, xxxii. 46. *Farrar v. Greene*, xxxii. 574. *Coombs v. Topsham*, xxxviii. 204.

32. When an injury is occasioned by the united effect of a defect in the way and any other cause, the party bound to keep the road in repair is not liable. *Moore v. Abbott*, xxxii. 46. *Farrar v. Greene*, xxxii. 574. *Coombs v. Topsham*, xxxviii. 204. *Anderson v. Bath*, xlii. 346.

33. In such action, notice to the town, that such defect existed, is sufficiently proved, when it appears that the same was known to two of its inhabitants capable to communicate information of it, if they were not of the principal

men of the town, or were not assessed for public taxes. *Mason v. Ellsworth*, xxxii. 271.

34. And the jury may allow compensation for loss of time resulting from the injury, and for expenses suitably incurred to obtain a cure. *Sanford v. Augusta*, xxxii. 536.

35. And where the action is in the name of the husband and wife, to recover for "bodily injury" suffered by the wife, the loss of her labor resulting from the injury, as also the expense of a cure, may be included in the damage; that common law rule not being in force, which required that compensation for such loss of service and for such expenses could be recovered only in a suit brought by the husband alone. *Sanford v. Augusta*, xxxii. 536.

36. The standard of care required of travelers upon the highway is such care as persons of common prudence generally exercise. *Farrar v. Greene*, xxxii. 574.

37. By "damage in one's property" through a defect in a highway, within the meaning of R. S. of 1841, c. 25, § 89, is intended some injury *in rem*, by which the value is destroyed or diminished, as distinct from mere loss of time, or addition to one's expenses. *Weeks v. Shirley*, xxxiii. 271.

38. In suits for injuries sustained by alleged defects in the highways, the jury may consider the nature of the business in the town, "but such business forms only one of the facts to be considered in connection with the others, and with the obligation of the town to keep the way in a safe and convenient state of repair for the inhabitants of other towns, as well as of its own inhabitants." *Church v. Cherryfield*, xxxiii. 460.

39. The jury are not to infer a defect in a highway at a particular time and place, simply because an injury was sustained at that time and place; but they are to consider that in connection with the other facts in the case. *Church v. Cherryfield*, xxxiii. 460.

40. The terms "safe and convenient," as used in the statute in relation to roads, do not mean entirely safe and entirely convenient, but are to be considered by the jury in a particular sense, according to their knowledge and experience in the ordinary transactions of men. *Church v. Cherryfield*, xxxiii. 460.

41. In communicating the rule, the words are employed in their usually accepted meaning. *Church v. Cherryfield*, xxxiii. 460.

42. In a suit for an injury, sustained by the upsetting of a carriage through a defect in the highway, evidence that, on former occasions, the driver had "appeared to be a competent driver," *seems* to be inadmissible. *Lawrence v. Mt. Vernon*, xxxv. 100.

43. In such actions, towns are not liable, unless the person in charge of the property injured was in the exercise of ordinary care at the time of the injury; and what is "ordinary care" must be determined by the circumstances of the case presented to the jury. *Garmon v. Bangor*, xxxviii. 443.

44. The Judge instructed the jury, upon the question of due care, &c., in driving, that the knowledge of the plaintiff, of the defect in the way, was not the knowledge of the son, who was driving the team:—*Held*, such to be good law. *Garmon v. Bangor*, xxxviii. 443.

45. Where two persons were passing in the same direction with a horse and sleigh, while the driver of the plaintiff's team was trying to pass them, as he was about to meet other teams, traveling on the same side of the way, in an opposite direction, at the time of the injury; it is not correct, as a mat-



ter of law, to instruct the jury that "he had a right to pass one side or the other; and that the jury should consider, whether, if the road was clear, there was any want of ordinary care and diligence, in driving on one side of the road rather than the other, or in the manner of his driving; if so, the plaintiff was not entitled to recover." *WELLS, J.*, dissenting. *Garmon v. Bangor*, xxxviii. 443.

46. Towns, having reasonable notice of a defect in one of their highways, are liable for an injury arising therefrom, after it is constructed and opened for travelers, although the time in which they were allowed to build it had not elapsed. *Blaisdell v. Portland*, xxxix. 113.

47. Under R. S. of 1841, c. 25, § 89, subjecting the party obliged to repair certain ways, &c., to fine for injuries resulting from defects therein, the amount of forfeiture, within the limits of the statute, may be fixed by the Court, in the exercise of its discretion. *State v. Bangor*, xli. 533.

48. And the Judge, at *Nisi Prius*, having imposed such forfeiture, his decision is final. *State v. Bangor*, xli. 533.

49. In an action against a town for injury to a horse, in consequence of a defective highway, it being shown that it occurred on the Lord's day, before sun down, the *onus* is upon the plaintiff to show that the traveling was a work of charity or necessity. *Hinckley v. Penobscot*, xlii. 89.

50. When children use a part of the public road for their sports, the town or city through which the way passes, is not responsible for injuries received by any of the children so engaged, though the injuries may result from a defect in the road. *GOODENOW, J.*, dissenting. *Stinson v. Gardiner*, xlii. 248.

51. Safety and convenience for travelers and their horses and teams is the rule by which to judge whether there be any defect or want of repair, or sufficient railing upon the highways. *Stinson v. Gardiner*, xlii. 248.

52. The liability of a town for damages arising from a defective highway depends upon proof of the same facts that would render it liable to indictment; and, in all cases where it may be held for damages, it may be indicted. *Davis v. Bangor*, xlii. 522.

53. A defect or want of repair is either inert matter incumbering the highway, upon or over it, or structural defects endangering public travel. *Davis v. Bangor*, xlii. 522.

54. Hence, a team temporarily stationary in a street or road, under the charge of the owner or driver, is not a defect or want of repair to be amended, nor an obstruction to be removed, and the town or city is not liable for injuries occasioned thereby. *TENNEY, J.*, dissenting. *Davis v. Bangor*, xlii. 522.

See NOTICE, &c., 5.

TOWNS, 1—25.

#### (b) *Indictment.*

55. An indictment against a town cannot be maintained upon an allegation that there is a highway extending into several towns, and that the same or that part of it which lies within the defendant town is defective. *State v. Milo*, xxxii. 55.

56. An indictment for obstructing a "public street" is sustained upon proof of obstruction to a "town way." *State v. Beeman*, xxxv. 242.

57. An indictment for a nuisance, by erecting and maintaining a building

upon a "common highway," is not sustained by proof of such erection, &c., upon a "town way." *State v. Bradbury*, XL. 154.

See INDICTMENT, 1.

WAY, 52.

(c) *Obstructions by individuals.*

58. A remedy by action lies in favor of a town for damage sustained by flowing back the water upon the banks of its public highway by a dam, though erected for mill purposes only. *Monmouth v. Gardiner*, XXXV. 247.

59. And that, too, though the owner of the dam may have obtained the permission of the proprietor to flow the land; and though the town at a reasonable expense, might have prevented the damage; and though other causes, jointly with the dam, contributed to occasion the damage; and though the dam was not the principal part of the damage. *Monmouth v. Gardiner*, XXXV. 247.

60. An accident having occurred by contact with a telegraphic wire across a highway, the plaintiff must not only prove that the injury was occasioned by the fault of the defendant, but that there was no neglect or want of ordinary care contributing, on his part, to the injury. *Dickey v. Maine Telegraph Co.*, XLIII. 492.

## VIII. LAW OF THE ROAD.

61. A traveler, with his horse and carriage, where the highway is unobstructed, without notice of a carriage behind him, may use any part of it wrought for the public accommodation. *Foster v. Goddard*, XL. 64.

62. And such traveler will be entitled to recover damage for an injury done to him, by the collision of another's carriage with his own, on the highway, if he shows that he was in the exercise of ordinary care at the time; or if not, and the want thereof in no wise contributed to produce the injury; and if it was occasioned by the want of ordinary care in the other party. *Foster v. Goddard*, XL. 64.

## IX. WAYS OTHER THAN BY STATUTE, AND RIGHT OF WAY.

63. A dedication of land, by the proprietor, for a highway, can be shown only by clear indications that he intended to surrender it, not for the benefit of certain persons only, but for the public; and the public must have adopted it as such, which may be inferred from a common use of the land as a highway. *Bangor House v. Brown*, XXXIII. 309. *Cole v. Sprowl*, XXXV. 161. *State v. Bradbury*, XL. 154.

64. Where, by one of the persons having a right of passage, an action is brought against another of them for obstructing it, no defence is established by proof that the plaintiff has obstructed it at its termination adjoining his own land. *Ricker v. Barry*, XXXIV. 116.

65. Proof that a space had been fenced out more than twenty years, and that a strip, occupying a part of that space, had been wrought by the town for more than twenty years, and traveled by the public as a road, will not

show, as matter of law, that the whole space had become, by user, a public highway. *Lawrence v. Mt. Vernon*, xxxv. 100.

66. No particular ceremony is required to make a dedication, nor is any time prescribed by law as essential to secure the enjoyment. They may be presumed from facts and circumstances proved. *Cole v. Sprowl*, xxxv. 161. *State v. Wilson*, XLII. 9.

67. If one grant a right of passage in an existing road over his own land, and the limits of the road are not defined in the grant, its locality, as established and traveled prior to the grant, may be established by parol. *Cole v. Sprowl*, xxxv. 161.

68. The existence of a pile of lumber upon a particular spot, at the time of such grant, does not necessarily determine that the road had not previously been established over that spot. *Cole v. Sprowl*, xxxv. 161.

69. If, by a grant of land, bounded on a road, there is conveyed a right of passage upon such road, it is not law, to be laid down by the Court, that the grantee can use the way for no other purposes than it had been used for by the grantor. *Cole v. Sprowl*, xxxv. 161.

70. For obstructing the plaintiff's right of way, or for unlawfully excluding the light from his doors and windows, the damages are to be assessed to the date of the writ only. *Cole v. Sprowl*, xxxv. 161.

71. A right of way cannot be established by user, when such use arose by reason of a legal location. *Larry v. Lunt*, xxxvii. 69. *State v. Wilson*, XLII. 9.

72. Public ways may have a legal existence by dedication to the general public, and limited only by the wants of the community. But to constitute a dedication, the act of dedication and the acceptance of it by the public, are essential. *State v. Wilson*, XLII. 9.

73. Highways may have a legal existence from immemorial usage. Long occupation and enjoyment, unexplained, will raise a presumption of a grant, even of the land itself, and of acts of legislation and of matters of record. *State v. Wilson*, XLII. 9.

#### X. WAYS IN UNINCORPORATED PLACES.

74. The statute of 1821, c. 118, authorized the establishment of highways in unincorporated townships, at the expense of the owners. *Longfellow v. Quimby*, xxxiii. 457.

75. By the Act of 1841, c. 196, § 1, before a road is located across lands not situated within an organized plantation or incorporated town, notice must be given of the pendency of the petition, and of the time and place appointed to consider the same and adjudicate thereon. *Ware v. Penobscot Co. Commissioners*, xxxviii. 492.

76. It is essential, in laying out a way across a township, that the commissioners determine at whose expense the way is to be made. *Ware v. Penobscot Co. Commissioners*, xxxviii. 492.

See COUNTY COMMISSIONERS, 59, 60.

## XI. SURVEYORS OF HIGHWAYS.

77. A surveyor of highways has no authority to subject to a public easement any land not lying within the limits of the road. *Plummer v. Sturtevant*, xxxii. 325.

78. However important it may be to the public to have the water turned off from the highway, the surveyor has no authority to make a ditch for that purpose through adjoining lands. And, for such an act, trespass may be maintained by the owner of the land. *Plummer v. Sturtevant*, xxxii. 325.

79. For labor done upon the highway, under the surveyor's express promise to pay for it, an action may be maintained against him, although the jury were not satisfied that the defendant intended to render himself personally liable. *Field v. Towle*, xxxiv. 405.

80. The list of delinquent persons, with the amounts of the deficiency of each, which it is the duty of highway surveyors to render to assessors, cannot be legally rendered, unless the surveyor has given the notice and made the demand required by statute. *Patterson v. Creighton*, xlii. 367.

81. A return of such list, without such previous compliance with the statutes, would render the surveyor liable to the aggrieved party *Patterson v. Creighton*, xlii. 367.

82. The records, in the offices of the clerks and assessors, should show that the surveyors' duties have been properly discharged. *Patterson v. Creighton*, xlii. 367.

82. A surveyor will not be allowed to perfect his list, if his own evidence shows that his preliminary proceedings would not justify it. *Patterson v. Creighton*, xlii. 367.

83. If a surveyor of highways dig down a street or road with discretion, and not wantonly, he is not liable, either at common law or by statute, when acting under legal authority. *Hovey v. Mayo*, xliii. 322.

84. Where a new power is given by statute, and the means of executing it prescribed therein, the power must be executed accordingly. And this principle is applicable to the Act of 1846, c. 216. *Hovey v. Mayo*, xliii. 322.

85. A corporation, having power to raise money for the repair of highways, may make compensation therefor, in the material taken from the same in the process of making the improvement. But, whether they can do so to the injury of the owner of adjoining land, where the record, conferring the power, shows the sole purpose to be for the benefit of the individual making the removal, may well be doubted. *Hovey v. Mayo*, xliii. 322.

86. A corporation, having the power to determine what repairs should be made in its roads and streets, may exercise, through its officers, acting within the scope of their authority, its own judgment, which cannot be set aside by a jury in a suit at law. *Hovey v. Mayo*, xliii. 322.

87. A street commissioner, or one acting under him, cannot be made liable for the purposes of the city council, while acting under an order passed within the scope of their authority, or for his own purposes in the proper execution of the order. *Hovey v. Mayo*, xliii. 322.

## WHARF.

See DEED, 140.

## WIDOW, AND WIDOW'S ALLOWANCE.

1. Where a widow waives the provision made for her by her husband's will, and claims dower, she is entitled to the same allowance out of the personal estate as if he had died intestate. *Brown v. Hodgdon*, xxxi. 65.

2. And that too, whether the estate be solvent or insolvent; and although all the personal estate was specifically bequeathed. *Brown v. Hodgdon*, xxxi. 65.

3. If an insane widow waives a provision made for her in her husband's will, and, at no lucid interval, evinces a disposition to avoid the waiver, and if the waiver is confirmed by the guardian, it cannot be objected that the waiver was inoperative. *Brown v. Hodgdon*, xxxi. 65.

4. A contract by a widow with the heirs and legatees, that, (although she had previously waived the provision made for her in her husband's will,) she would accept that provision, and make no other claim upon the estate, can have no effect upon the action of the Probate Court. *Gowen, appel't*, xxxii. 516.

5. An allowance to a widow can only be discharged from the proceeds of the personal estate. And, if the allowance exceeds the value of such estate, it cannot be sustained for such excess. *Paine v. Paulk*, xxxix. 15.

## WILL.

- I. PROBATE.
- II. CONSTRUCTION.

## I. PROBATE.

1. If a will has been duly approved and allowed by a Probate Court, *having jurisdiction*, its validity cannot be called in question by a Court of common law, except by appeal. *Patten v. Tallman*, xxvii. 17.

2. The mere fact that the Judge of Probate had attested the will as one of the subscribing witnesses thereto, does not deprive him of jurisdiction. *Patten v. Tallman*, xxvii. 17.

3. The competency of an attesting witness to a will is to be determined upon the state of facts existing at the time of attestation. *Patten v. Tallman*, xxvii. 17.

4. If it be impossible, upon legal principles, to present the testimony of one of the three attesting witnesses to a will, it may be approved without his testimony. *Patten v. Tallman*, xxvii. 17.

5. If one of the attesting witnesses to a will be otherwise competent, he is not rendered incompetent, because, at the time of its attestation and approval and allowance, he was Judge of Probate for that county. *Patten v. Tallman*, xxvii. 17.

6. Although a testator omit to make, in his will, any provision for one of his children, and it does not appear that it was intentional, the will may be approved without any condition or restriction. And the remedy of the child is by subsequent proceedings in the Probate Court or otherwise. *Doane v. Lake*, xxxii. 268.

7. On the question whether a will shall be established, there is no legal presumption of the testator's sanity; that is a fact to be proved. *Cilley v. Cilley*, xxxiv. 162.

8. The subscribing witnesses to a will, though not experts, may give opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded; but the facts are more important than the opinions. *Cilley v. Cilley*, xxxiv. 162.

9. It is not essential that any of the subscribing witnesses should testify to any opinion respecting the sanity of the testator. *Cilley v. Cilley*, xxxiv. 162.

10. To the publication of a will no prescribed form of words is requisite. No other publication is necessary than that the testator, when executing the instrument, was apprised of its contents, and knew and intended it to be his will. *Cilley v. Cilley*, xxxiv. 162.

11. A will, to be effectual, must be executed in conformity with the requirements of the statute. Interlineations, made by the testator without a new attestation, would be to disregard the statute requirement. Such interlineations are therefore disregarded, and the will approved according to the original draft. *Doane v. Hadlock*, xlii. 72.

12. So, with interlineations made by a stranger. Interlineations, made by the legatee himself, will, at most, only avoid the legacy so altered. The other bequests will not be destroyed thereby. *Doane v. Hadlock*, xlii. 72.

## II. CONSTRUCTION.

13. The testator provided in his will, that if his two sons, J. and H., or either of them, after his decease, should become surety for any person or persons, "they shall, in such case, forfeit all bequests, &c., given them in this will;" and afterwards, by a codicil to the same will, he devised "to my son H. in trust for my son J., during the natural life of the said J., the G. farm:" *Held*, that the estate so devised in trust was not forfeited, if J. and H. had become sureties for others. *Patten v. Tallman*, xxvii. 17.

14. The testator provided by will, that "all my property, real and personal, in the town of M., and the income of the same, be given to my wife E., to be used and disposed of by her for her convenience and comfort during her life; and what may remain after the decease of my wife E. be distributed equally to my children who survive, and the legal representatives of such as have deceased:"—*Held*, that E. had the power to sell and dispose of such personal estate. *Scott v. Perkins*, xxviii. 22.

15. A testator is presumed to use words in their ordinary meaning, if such a construction would not be in conflict with his manifest meaning. *Osgood v. Lovering*, xxxiii. 464. *Shaw v. Hussey*, xli. 495.

16. The use of the word "children" does not necessarily, and under all circumstances, exclude a grand-child. But a grand-child will not be considered as included, unless such intention is clearly exhibited, or the word appears to have been used as synonymous with issue or descendants. *Osgood v. Lovering*, xxxiii. 464.

17. A testator, having five children, after making certain legacies, bequeathed the residue of his personal property to four of his children, one fifth part each, and, of the other fifth, one-half to a daughter, and the other half to a son of that daughter, to be paid to him when of age, with interest. Afterwards, by a codicil, he bequeathed, "for the benefit of his family," for the term of ten years, all that residue, which, in the will, he had directed to be divided "among his children;" after which term it was to be divided as by the will:—*Held*, that the codicil merely postponed the distribution for the term of ten years; and that the interest upon the grand-son's legacy was not to commence until the expiration of that term. *Osgood v. Lovering*, xxxiii. 464.

19. In the construction of a will, the intention of the testator, as clearly discoverable from the whole will, is to be effectuated, if it can be done consistently with the established rules of law. *Fisk v. Keene*, xxxv. 349. *Deering v. Adams*, xxxvii. 264. *Shaw v. Hussey*, xli. 495. *Doane v. Hadlock*, xlii. 72.

20. In a devise to a person and his heirs, with a devise over in case of his dying without issue, the words "dying without issue" are construed to mean an indefinite failure of issue; and the word "heirs" to mean heirs of his body. *Fisk v. Keene*, xxxv. 349.

21. The testator bequeathed his personal property to his wife, and the will also provided, she should have the "sole management and control of, and receive all the rents, &c., of all his real estate at the time of his decease, *excepting what is herein bequeathed*, so long as she shall remain his widow, or until their youngest surviving child shall be of lawful age." He also devised some of his real estate to his children; and added:—"It is to be distinctly understood, that it is not my wish or intention, in any event, to deprive my said wife of the right of dower in any of my said estate, *except as above excepted*." He also provided in the next clause, that, when his youngest surviving child should become of age, all his "estate then remaining, excepting the dower as aforesaid, and that, at the decease of my said wife, should be equally divided," &c.:—*Held*, that the testator intended that his widow should not be barred of her claim of dower in his lands not devised; and that he used the word "bequeath" as synonymous with "devised," and that it must be so interpreted. *Dow v. Dow*, xxxvi. 211.

22. The intention of the testator is to be ascertained by comparing all parts of the will together; and that construction is to be given which will best comport with the general objects, and least conflict with particular provisions of the will. *Deering v. Adams*, xxxvii. 264. *Shaw v. Hussey*, xli. 495.

23. Although a will may not contain any express words of grant to executors, or any technical words of limitation to them, yet, by implication, a fee will vest in them, if, upon a view of the whole will, such fee be indispensable for effectuating the objects of the testator. *Deering v. Adams*, xxxvii. 264.

24. When a will creates trusts, which require, for their effectual execution, an estate in fee, such estate will be implied. *Deering v. Adams*, XXXVII. 264. *Richardson v. Woodbury*, XLIII. 206.

25. A will prohibited the vesting of real estate in the heirs at law, for twenty years, who were the minor grand-children of the testatrix, and gave to the executors the entire care and management of it during that period;—required that, from the income, the grand-children should be supported and educated, and the surplus invested by the executors;—that, during the twenty years, the estate should remain undivided, and immediately afterwards should vest in the grand-children;—prohibited any sale of it by the executors, but authorized them to lease it and exchange a specified part of it for other land, and to execute deeds therefor;—required that, upon the marriage of the female grand-children, the executors should protect the portion of each one of them from the control of their respective husbands;—and provided that, if within the twenty years the grand-children should all die without issue, the estate should be appropriated for relieving the poor, &c., in such manner as the executors should prescribe:—*Held*, that, by construction, the executors took a fee simple in trust, defeasible at the end of twenty years, or when the trust created by the will should have been accomplished. *Deering v. Adams*, XXXVII. 264. *Richardson v. Woodbury*, XLIII. 206.

26. In determining the meaning of a particular devise, reference may be had to the other provisions of the will. *Pratt v. Leadbetter*, XXXVIII. 9.

27. That a devisee may have an estate of inheritance, it must appear to have been the intention of the testator, by the words used in the devise, or clearly implied from the entire instrument. *Pratt v. Leadbetter*, XXXVIII. 9.

28. A testator made the following devise:—"I give and bequeath unto my son, O. P., the land he is now in possession of, to him, during his natural life, to improve, and then to his heirs after him, for their sole right:"—*Held*, that, as the remainder of the will evidenced no intention to give the devisee an estate of inheritance, he took thereby only an estate for life. *Pratt v. Leadbetter*, XXXVIII. 9.

29. The provisions of a will, that the personal estate should remain in the hands of executors, only interposed a trustee in whom the legal estate vested, but did not affect the duration or magnitude of the estate. *Stone v. North*, XLI. 265.

30. Where an executor is invested by implication with the title to real estate, he does not thereby derive any title to property held by the testator in trust. *Richardson v. Woodbury*, XLIII. 206.

See EQUITY, 21.

## WITNESS.

- I. COMPETENCY.
- II. EXAMINATION.

*For witness' certifying travel, &c.*, See PENALTY, 6—9.



## I. COMPETENCY.

- (a) PARTIES TO THE NOTE OR SECURITY.
- (b) PARTIES TO THE SUIT.
- (c) INTEREST EQUALLY BALANCED.
- (d) WHEN EXCLUDED FOR INTEREST.
- (e) WHEN NOT EXCLUDED FOR INTEREST.
- (f) RESTORATION OF COMPETENCY.
- (g) AGENTS AND ATTORNEYS.
- (h) GENERALLY.

(a) *Parties to the note or security.*

1. In an action for aiding a debtor in the fraudulent concealment or transfer of his property, under R. S. of 1841, c. 148, § 49, the debtor is a competent witness to prove that a note or account produced, and purporting to be due from him, was in fact due. *Aiken v. Kilburne*, xxvii. 252.

2. In a suit by the indorsee of a note against the maker, the payee is a competent witness, as to occurrences subsequent to its inception, to prove such facts as would defeat the note. *Davis v. Sawtelle*, xxx. 389. *Smith v. Morgan*, xxxviii. 468. *Lincoln v. Fitch*, xlii. 456.

3. The Court will therefore examine the deposition of such a witness, to ascertain the admissibility of the facts therein stated. *Davis v. Sawtelle*, xxx. 389.

4. In a suit by the indorsee against the maker, upon a note indorsed by the payee "without recourse," the payee is a competent witness to prove any facts which would not impeach its original validity, or impair the credit and character which his indorsement has given to it. *Davis v. Sawtelle*, xxx. 389. *Berry v. Hall*, xxxiii. 493. *Goodwin v. Chadwick*, xxxv. 193. *Lincoln v. Fitch*, xlii. 456.

5. In a suit upon a negotiable note which came into the possession of the plaintiff after its maturity, the payee is a competent witness to prove its payment by the maker, while in his hands. *Smith v. Morgan*, xxxviii. 468.

6. An assignee of an unnegotiable note, who has commenced a suit thereon, but subsequently assigned his interest to a third person, not having indorsed the writ, and no proceedings having been had to require it of him, is a competent witness in such suit. *Bunker v. Gilmore*, xl. 88.

7. Facts may be so interwoven with each other that a person who is a competent witness as to some of them, and wholly incompetent as to others, cannot testify to those for which he would otherwise be a competent witness. *Lincoln v. Fitch*, xlii. 456.

(b) *Parties to the suit.*

8. If a plaintiff offer himself as a witness, and be sworn on the *voir dire*, and then be rejected as a witness, and the defendant then propose to him any inquiries pertaining to the cause, he is not thereby made a general witness to other facts. *Robbins v. Merritt*, xxxi. 451.

9. From the making of any such inquiry, no inference can be rightfully drawn that the defendant consents to the statement, by the plaintiff, of any facts, except the facts thus inquired of. To such inquiries, the plaintiff is

not bound to answer. And though he should answer some, he is not compellable to answer others. *Robbins v. Merritt*, xxxi. 451.

10. Where one of two defendants in a suit upon a note is defaulted, he cannot be a witness to prove usury in the contract. *Thornton v. Blaisdell*, xxxvii. 190.

11. The trustees of a ministerial and school fund, in an action in the name of the corporation, are competent witnesses, if they are not personally named as plaintiffs. *Andover v. Reed*, xxxix. 41.

12. A negotiable note is assignable. The assignor, having been examined as a witness, by the plaintiff, "deriving title through and from the witness," it is within the letter and spirit of the Act of 1855, c. 181, § 3, to admit the defendant, as the "adverse party," to testify "to the same matter, in his own behalf," which the assignor had covered by his testimony in the direct examination. *Fogg v. Babcock*, xli. 347.

(c) *Interest equally balanced.*

13. In a suit between the vendee of a chattel and an attaching officer, upon the question whether the sale was fraudulent as against the creditors of the vendor, the interest of the vendor is a balanced interest, and he is therefore a competent witness for either party. *Ward v. Chase*, xxxv. 515.

14. In trespass, for injury to personal property, the person who committed the act complained of is competent as a witness for the plaintiff, to prove that the act was done by direction of the defendant. *Jones v. Lowell*, xxxv. 538.

15. Where the parties to a suit claim title to the premises from the same grantor, the demandant, by a mortgage, and the tenant, by a later quit-claim deed earliest on the record, the common grantor is a competent witness to prove that the tenant, prior to the delivery of his deed, had notice of the existence of the former title. *Paul v. Frost*, xl. 293.

(d) *When excluded for interest.*

16. In an action for land, by one claiming under a paramount title, if the tenant vouch his immediate warrantors, who take upon themselves the defence, their release of a previous warrantor will not render the latter a competent witness for the defence. *Crooker v. Jewell*, xxix. 527.

17. When the immediate effect of a judgment in favor of one of the parties, is to confirm a third person in the enjoyment of an interest in possession, such third person is not competent as a witness for that party. *Atkinson v. Snow*, xxx. 364.

18. As a general rule, a vendor of personal property is not a competent witness, in support of a suit in which his vendee is attempting to recover for the value of the property against a third person. *Thompson v. Towle*, xxxii. 87.

19. His interest is not balanced, although such third person, in a suit by himself against the witness, had given credit for the property, without the consent of the witness, and taken his judgment only for the balance of his claim. *Thompson v. Towle*, xxxii. 87.

20. A surety, by making a partial payment on the note, had extended its vitality against himself. After the limitation bar upon the note had attached

as to the principal, but within six years from the time of the partial payment, a suit was brought upon the note against the surety for the balance: — *Held*, the principal was not a competent witness for the surety, because of his accountability over to the surety, notwithstanding the statute of limitations. *Odell v. Dana*, xxxiii. 182.

21. A surety on a bond, given by a debtor to procure his release from arrest on mesne process, is not competent as a witness for the defendant on the trial. *Cates v. Noble*, xxxiii. 258. *Stuart v. McDougald*, xxxv. 398.

22. The mere proof that the master sailed a vessel "on shares" will not authorize one of the part owners to be a witness for the master, in a suit against him for wages of one of the crew. *Lufkin v. Patterson*, xxxviii. 282.

23. A receipt for goods attached on writs, in which receipt was the stipulation, "that they are not to be demanded except on the executions which may be recovered in said suits," is not a competent witness for the defendant in the trial of the same actions. *Oxnard v. Swanton*, xxxix. 125.

(e) *When not excluded for interest.*

24. In an action by a creditor, under R. S. of 1841, c. 148, § 49, the debtor is a competent witness for the plaintiff. *Philbrook v. Handley*, xxviii. 53. *Aiken v. Kilburne*, xxvii. 252.

25. Nor is he incompetent because he appeared to have been the principal actor in the fraudulent transfer of his property; nor because he had given an entirely different account of the transaction between himself and the defendant, under oath, in his petition to be declared a bankrupt. *Aiken v. Kilburne*, xxvii. 252.

26. In an action by the purchaser against the seller of a note upon which the names of indorsers have been forged, the broker, through whom the sale was negotiated, is a competent witness for the plaintiff, if he was ignorant of the forgery, and if he made no promise or representation concerning the note. *Baxter v. Duren*, xxix. 434.

27. In an action by one of the co-tenants of a grist-mill against another for his share of the rents and profits, a third co-tenant is a competent witness for the defendant to prove the legality of the mill-owners meeting. *Buck v. Spofford*, xxxi. 34.

28. In the trial of an action, in which property has been attached on the writ, a surety upon a replevin bond, by virtue of which the same property was replevied from the attaching officer at the suit of a third person, is a competent witness for the defendant. *Johnson v. Whidden*, xxxii. 230.

29. That the witness, in such a suit, was the defendant's grantee of land attached on the writ, will not exclude his testimony, unless it appear that the conveyance was subsequent to the attachment. *Johnson v. Whidden*, xxxii. 230.

30. One summoned as a trustee, and not having yet disclosed or been defaulted, is a competent witness for the defendant. *White v. Means*, xxxiii. 495.

31. The previous declarations of the plaintiff, that he supposed he should have to sue the defendant for the benefit of a third person, and that, if such third person should sue the defendant, he (plaintiff) should not object to it,

will not preclude the plaintiff from using such third person as a witness in the suit against the defendant, unless it be proved that the suit *is* for the benefit of the witness, or that the witness will have some legal right in the avails of the suit, should the plaintiff recover, or that he will be injuriously affected if the defendant recover. *Cole v. Cole*, xxxiii. 542.

32. In a prosecution by the State, an inhabitant of the town to which the law appropriates the penalty, if recovered, is a competent witness. *State v. Woodward*, xxxiv. 293.

33. In a writ of entry against an alleged disseizor, brought by one who had mortgaged the land, before the commencement of the suit, to secure a note, the mortgagee is a competent witness for the demandant. *Woodman v. Skeetup*, xxxv. 464.

34. In a suit by the vendee of a chattel against an officer, by whom it had been attached in an action against the vendor and his co-partner, such co-partner is competent as a witness for the officer; although, should the officer recover, the avails of the property would *probably* go to reduce the witnesses' liability upon the partnership debt. *Ward v. Chase*, xxxv. 515.

35. A stockholder in a corporation has no such interest as to prevent him from testifying to his official acts in such company. *York & C. R. R. Co. v. Pratt*, xl. 447.

(f) *Restoration of competency.*

36. The interest of a witness is not removed by a receipt, unsealed, in full of all demands made by the party calling him. *Dennett v. Lamson*, xxx. 223.

37. In an action by an indorsee of a note against the indorser, the maker, when released by the defendant, is a competent witness for him. *Franklin Bank v. Pratt*, xxxi. 501.

38. In an action by the holder of a draft against the acceptor, the drawer, when released by the defendant, is a competent witness for him. *Franklin Bank v. Pratt*, xxxi. 501.

39. The cashier of a bank, being released by the *directors*, is a competent witness for the bank to prove that, through a mistake, he had given too large a credit to a depositor, in the bank book, made for him by the cashier. *Lewis v. Eastern Bank*, xxxii. 90.

40. One of several heirs, to whom land and personal estate descended, may be a witness for the administrator, after having conveyed his interest in the land and released to the administrator, as such, his interest in the personal property. *Reed v. Gilbert*, xxxii. 519.

41. In a replevin suit, the interest of a surety on the replevin bond is removed by a deposit for his use, made with the clerk of the court, by the plaintiff, of an amount equal to the penalty of the bond. And such deposit is subject to the control of the Court, until accepted by the party for whose use it was made. *Cooper v. Bakeman*, xxxiii. 376.

42. A release by the officer, delivered to a receiptor, after notice to the latter of an assignment of the receipt to the plaintiff, will not qualify the receiptor to be a witness for the defendant in the action in which the receipt was taken. *Jewett v. Dockray*, xxxiv. 45.

43. In a suit by the special owner of property against a common carrier, to recover its value, the same having been lost by such carrier, the general owner,

after having released the plaintiff, is competent to testify for the latter the loss and the value. *Moran v. Portland Steam Packet Co.*, xxxv. 55.

44. A witness' liability to an estate may be released by one alone of several joint administrators. *Shaw v. Berry*, xxxv. 279.

45. The interest of a surety on a bail bond may be discharged by a deposit with the clerk, for the benefit of the witness, if the judgment should be against the defendant; and may be made by any person, of his own money; and when thus made by a third person, the plaintiff, even after judgment in his favor, has no right to the money; neither can the Court order it to be applied in payment of the judgment. *Stuart v. McDougald*, xxxv. 398. *Jordan v. Young*, xxxvii. 276.

46. Where a note is payable to partners, and by them negotiated, the indorsee, after releasing the partners, may use them as witnesses in an action against such makers. *Leonard v. Wildes*, xxxvi. 265.

47. A release to a payee under seal, as to all liability on the note, for a consideration less than the amount due thereon, renders him a competent witness for the holder. *Hankerson v. Emery*, xxxvii. 16.

48. In an action involving the boundaries of the land, the grantor is a competent witness for the grantee, after a release from his covenants of warranty; notwithstanding he has reserved in his deed the right to re-take possession, and have the use of the same during his life, should he need it for his support. *Gilbert v. Curtis*, xxxvii. 45.

49. The interest of a receptor for property attached, may be released by a deposit made with him of money sufficient for his indemnity, with authority to appropriate it for that purpose: even if such deposit be made by the attorney, of his own money, and without authority from the defendant. *Jordan v. Young*, xxxvii. 276.

50. A physician, who has contracted with a town to furnish the necessary medical services for their poor, at a stipulated price, with such additional sum as they should recover for his services rendered to paupers chargeable to other towns, in a suit by the town to recover for such services and other supplies, is a competent witness, after his portion embraced in the suit has been paid by the town. *Richmond v. Thomaston*, xxxviii. 232.

51. Whether a surety on an executor's bond can be discharged, so as to make him a competent witness for the executor, without notice given by the Probate Court, *quere*. *Franklin Bank v. Cooper*, xxxix. 542.

(g) *Agents and attorneys.*

52. Where an attorney executed a replevin bond in the name of his clients, a prosecution of the replevin suit by them is a ratification, and will discharge the attorney's interest in the suit, which will render him a competent witness for the plaintiffs. *Nara. L. Prop'rs v. Wentworth*, xxxvi. 339.

53. In trespass against an officer, for taking a chattel on an execution, the creditor's attorney, who was directed by the creditor to cause the chattel to be seized, if he thought it advisable, thereupon directed the officer to take the chattel, and informed him that the creditor would indemnify him: — *Held*, that the attorney is a competent witness for the defendant. *Foord v. Hains*, xxvii. 207.

(h) *Generally.*

54. That the employments of a witness have not been such as to require him to distinguish between true and simulated handwritings is not, of itself, a sufficient reason to preclude him from giving an opinion as to the genuineness of a disputed signature, though the opinion be founded merely upon a comparison of writings. *Sweetser v. Lowell*, xxxiii. 446.

55. The Act of 1856, "in relation to witnesses," was not intended to exclude the complainant in a bastardy process, "until the defendant shall first offer himself as a witness," on the ground of an implied offence against the criminal law. *Dyer v. Huff*, xliii. 255.

## II. EXAMINATION.

(a) WHAT A WITNESS IS EXCUSED FROM TESTIFYING TO.

(b) CONTRADICTION AND IMPEACHMENT.

(c) VOIR DIRE.

(a) *What a witness is excused from testifying to.*

56. In a criminal trial, the complainant is not compellable to state, as a witness, the reason which induced him to believe the charge made in the complaint. *State v. McNally*, xxxiv. 210.

(b) *Contradiction and impeachment.*

57. In order to discredit an opposing witness, by proving that he had made declarations in conflict with his testimony, it is not requisite that he should be previously interrogated as to such declarations. *Wilkins v. Babbershall*, xxxii. 184.

58. Where A. had testified for the State, both upon a former and upon the present trial, and B., for the defendant, had testified to a conflict in the testimony of A., as given at the different trials, the State, in order to impeach the testimony of B., cannot use the bill of exceptions, taken in the former trial, unless the same had been signed or written or assented to by B. *State v. Bonney*, xxxv. 105.

59. A party, having called the subscribing witness to prove the execution of an instrument, is not thereby precluded from proving, by other persons, that such witness had elsewhere made statements in conflict with his testimony. *Shorey v. Hussey*, xxxii. 579.

60. A party, calling a witness who misstates a particular fact, is not precluded from showing by other competent evidence the truth of the fact, in contradiction to the testimony of his own witness. *Hall v. Houghton*, xxxvii. 411.

61. Wilfully corrupt and false testimony, on a material point, does not so absolutely discredit the witness as to any other fact testified to by him, that, as matter of law, the jury are bound to disregard his testimony. *Parsons v. Huff*, xli. 410. *Merrill v. Whitefield*, xli. 414.

62. Evidence to impugn the character of a witness is commonly to be confined to his character for truth. Testimony to show the improbability of a

transaction as stated by a witness, but having no tendency to show that he had given a different account of it, is not a mode of impeachment known to the law. *Shaw v. Emery*, XLII. 59.

63. Testimony collateral and irrelevant to the issue cannot properly be offered to contradict or impeach a witness. *Brackett v. Weeks*, XLIII. 291.

64. A party calling a witness cannot impeach his competency or credibility; but he may show that he was mistaken, and his counsel may argue such mistake to the jury. *State v. Knight*, XLIII. 9.

### (c) *Voir dire*.

65. The interest of a witness may be shown from his own examination, or by evidence *aliunde*; but the adoption of either of these modes precludes a resort to the other. *LeBarron v. Redman*, xxx. 536. *Stuart v. Lake*, xxxiii. 87.

66. After an unsuccessful attempt to exclude a witness upon the *voir dire*, his testimony in chief may be stricken out upon a discovery of his interest. *LeBarron v. Redman*, xxx. 536.

67. If a party would exclude an interested witness, his objection must be presented at the earliest opportunity. If not so presented, a presumption arises that the objection is waived. *Stuart v. Lake*, xxxiii. 87.

68. It is not competent for an objecting party, in order to exclude a witness, to prove that the witness has made admissions of his interest in the case. *Stuart v. Lake*, xxxiii. 87.

## WRITS AND PROCESSES.

- I. FORM AND VALIDITY.
- II. INDORSEMENT.
- III. SERVICE.

### I. FORM AND VALIDITY.

1. A writ may lawfully be framed as an original summons, with or without an order to attach property; or, (excepting as to contracts and judgments on contracts,) it may be framed to attach the property, and for want of it to arrest the body; or to attach the property without any order to arrest the body. *Cleaves v. Jordan*, xxxiv. 9.

2. The date of a writ is *prima facie* evidence of the time it was actually made. *Sargent v. Hampden*, xxxviii. 581.

3. When an action is brought against an administrator, upon a claim disallowed by the commissioners, after the estate is rendered insolvent, the writ should contain no order to attach the goods of the intestate. An attachment made by such writ is illegal. *Thayer v. Comstock*, xxxix. 140.

4. In trover, the writ should run against the body. *White v. Wall*, xl. 574.

5. The writs of *certiorari*, *prohibition*, *mandamus*, and *quo warranto*, and many other processes at common law, have undergone no material change; and when they are respectively the appropriate remedies for wrongful acts and neglects, all their peculiar characteristics must be retained. *Davis, ex parte*, **XLI**. 38.

See ABATEMENT, 4, 16.

## II. INDORSEMENT.

6. The writ, in which the plaintiff lives out of the State, is required by the statute to be indorsed by a sufficient person, an inhabitant of this State, before entry of the action. *Stone v. McLanathan*, **XXXIX**. 131.

7. Such requirement is satisfied by the indorsement thereon of the name of the attorney, being a sufficient person, although, over his name, the words "from the office of," were previously printed by the clerk. *Stone v. McLanathan*, **XXXIX**. 131. *Richards v. McKenney*, **XLIII**. 177.

8. And extraneous proof is not admissible to show that it was not the intention of such attorney to indorse said writ. *Richards v. McKenney*, **XLIII**. 177.

## III. SERVICE.

9. Though an attachment may have been made upon a writ, if a summons be not served, the defendant is not bound to appear, even though he procured from the officer, (upon tender of his fees,) an attested copy of the writ. Such an attachment, with such copy, thus obtained, is not a legal service. *Hodge v. Swazey*, **XXX**. 162.

10. In serving a writ, which directs the officer to attach the property of the defendant, and to summon him, there should be a separate summons, even though no attachment be made. In such case, a service by copy or by reading the original is not good. *Blanchard v. Day*, **XXXI**. 494.

11. R. S. of 1841, c. 114, § 48, authorizing a new summons to be issued and served in certain cases, does not extend to a case in which no summons had been delivered to the defendant or left at any place or with any person. *Briggs v. Davis*, **XXXIV**. 158.

12. In a suit brought in a common law court, a service upon a party adversely interested is essential. And a judgment rendered without such service would be a nullity. *Davis, ex parte*, **XLI**. 38.

13. When an arrest has been made on an insufficient oath, the action should be dismissed for want of legal service. *Shaw v. Usher*, **XLI**. 102.

See ABATEMENT, 2, 3, 9.

CONSTABLE, 2—6.



# APPENDIX.

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## ATTORNEY AND COUNSELOR.

1. An attorney, in virtue of his general employment to prosecute a suit, has no authority to discharge the execution which he may recover, unless upon the payment of the amount due. *Wilson v. Wadleigh*, xxxvi. 496.

2. Nor has he authority to assign the judgment or execution. And a discharge of the execution by such an assignee can impair none of the rights of the plaintiff in whose behalf the judgment was recovered. *Wilson v. Wadleigh*, xxxvi. 496.

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## BOUNDARIES OF LAND.

1. Land, held in co-tenancy and lying between known monuments, was divided into lots upon a plan exhibiting the width of each lot; and an assignment of the lots among the co-tenants was made according to the plan. The plan was erroneous, the distance between the exterior sides being greater than it represented: — *Held*, that the surplus was to be divided among the several lots, in proportion to their respective widths. *Whitten v. Hanson*, xxxv. 435.

2. In determining the true location of a line by a survey and plan, the less certain must yield. Thus, where, upon a division line, the bounds of the adjoining townships are all determined by admeasurement, the plan must be controlled by the admeasurement. *Wesley v. Sargent*, xxxviii. 315.

3. A direction to a surveyor, by the proprietors of land, to ascertain and determine certain lines of their townships, will not authorize him to establish a new line or change the true one; and, if he returns an erroneous location, and they act upon it without a knowledge of the error, they are not bound by it. *Wesley v. Sargent*, xxxviii. 315.

4. The act of incorporation of a township into a town, by its number, has reference to the true lines of such township, although an erroneous line is the only one actually indicated upon the earth. *Wesley v. Sargent*, xxxviii. 315.

5. The location of the dividing line between townships, made by the owner of one, cannot affect the rights of the owner of the other, unless he was a party to such location. *Talbot v. Copeland*, xxxviii. 333.

6. Where the same proprietors owned several townships, acts done by them on one, showing its boundary with reference to a particular purpose, can have no controlling influence in determining the boundaries of an adjoining town-

ship. Nor, if such owners established the corner bound of one of their townships, can the corner of the adjoining township be necessarily determined by the distance therefrom represented on their plan. *Talbot v. Copeland*, xxxviii. 333.

7. That a plan may be admissible to show the boundaries of a deed, it must be referred to as a part of its description. Without such reference, it cannot be protracted upon the earth to show the location. *Talbot v. Copeland*, xxxviii. 333.

8. The actual running of one of the lines of a township by the owner, and a reference thereto by the grantor, may be conclusive upon the grantee; but, without reference to a plan, it cannot affect the other boundaries of the township. *Talbot v. Copeland*, xxxviii. 333.

9. Where the dividing line was not originally run, and no monuments set up indicating it, its location is to be determined by measure according to the deed; and the owner of the township having the older title will first receive his quantity by admeasurement. *Talbot v. Copeland*, xxxviii. 333.

#### BAILMENT.

To charge a carrier with the loss of personal ornaments packed in a trunk with the baggage of the owner, it must satisfactorily appear that the trunk was not rifled after it was so packed and before it reached the possession of the carrier. *McQuesten v. Sanford*, xl. 117.

#### CASE.

An action of the case, charging that the defendant's act was done maliciously, may be maintained by proof that it was done negligently. For keeping a deleterious article so negligently as thereby to occasion damage to another, an action is maintainable, although from such keeping no damage would have accrued, except for the extraordinary, but not very uncommon, action of the elements. *Woodward v. Aborn*, xxxv. 271.

#### COMMON VICTUALLER.

So much of § 17, of c. 36, R. S. of 1841, as prohibits any one from being a common victualler without a license, is not affected by the Acts of 1846, c. 205, and of 1851, c. 211. *State v. Tibbetts*, xxxvi. 553.

## COSTS.

A party, who, on the trial of a writ of review, obtains a reversal, in effect, of the original judgment against him, by means of a certificate in bankruptcy, is not entitled to costs under our statute. *Foster v. Hinckley*, XL. 54.

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## COVENANT.

In an action of covenant under a quitclaim deed, in which are no covenants against incumbrances, save those which may originate under the grantor, if the declaration does not allege the incumbrances complained of, at the time of executing the deed, to have originated *from, by, or under* the grantor, it will be bad on demurrer. *Mayo v. Babcock*, XL. 142.

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## DEPOSITION.

In order to prove, by a deposition, the contents of a paper in the hands of the adverse party, it is not requisite that notice to produce should be given prior to the taking of the deposition. If the notice to produce be given a reasonable time before trial, the deposition will be admissible. *Harris v. Sturtevant*, XXXIV. 63.

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## EQUITY.

The statute authority to insert a bill in equity in a writ of attachment does not enlarge the equity jurisdiction of this Court in matters of fraud. A bill against several, alleging that one of them was indebted to the plaintiff, and that such debtor, by a confederacy with the others, had fraudulently transferred property to them for the purpose of hindering the collection of the debt, cannot be sustained, unless the indebtedment had previously been established by a judgment at law. *Skeele v. Stanwood*, XXXIII. 307.

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## FRAUD.

1. The fraudulent vendor or grantor parts with all his interest in the property; and the law affords him no aid, and equity, no relief in reclaiming it. *Andrews v. Marshall*, XLIII. 272.

2. Property, conveyed in fraud of creditors, is not liable to be seized and disposed of by such creditors or by an officer, otherwise than by authority of law. *Andrews v. Marshall*, XLIII. 272.

## FRAUDS, STATUTE OF.

A. agreed to do a piece of work for L., and employed laborers on his own credit. That the work might not stop, L., with A.'s consent, promised the laborers that, if they would continue to labor, he would pay their wages for the past as well as for the future, provided the funds in his hands, belonging to A., should be sufficient:—*Held*, the promise was not within the statute of frauds, or without legal consideration. *McKeenan v. Thissel*, xxxiii. 368.

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## HOMESTEAD EXEMPTION.

1. To secure the benefits of the Act of 1850, c. 207, a certificate, as indicated in § 4, should be filed with the register of deeds in the county where the land lies; and, unless the certificate clearly claims exemption from the debts mentioned in § 1, it will only be effectual against such as accrue after its record. *Lawton v. Bruce*, xxxix. 484.

2. And, to be effectual against debts mentioned in § 1, the debtor must have been the owner at the time of the contracting of such debt, and continued such at the time of filing the certificate. *Lawton v. Bruce*, xxxix. 484.

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## JUSTICE OF THE PEACE.

A complaint and warrant was made by a magistrate on the same page; and opposite his signature, upon the complaint, was a seal, but there was none upon the margin of the warrant, if the complaint and warrant should be separated by a straight line:—*Held*, the warrant was sufficiently sealed. *State v. Coyle*, xxxiii. 427.

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## LEVY.

1. A levy cannot be sustained, by proof that the judgment debtor had executed and acknowledged a lease of the land prior to the attachment, to another for life, and in the lease was a recital that the lessee had that day conveyed the same to the lessor by deed, against the tenant claiming by an absolute conveyance from the lessee, who is shown to have been the former owner. From such recital no satisfactory evidence is furnished of the real character of the conveyance. *Parlin v. Ware*, xxxix. 363.

2. A levy, under c. 94, § 11, of R. S. of 1841, in which the description of the common estate exceeds its real limits, and the shares of the debtor levied on are greater than he owns, will be effectual to vest his real proportion in the judgment creditor. This provision relates merely to the mode of levying on such estates. *Burnham v. persons unknown*, xl. 565.

3. After such levy, the judgment creditor holds in common with the cotenants. *Burnham v. persons unknown*, xl. 565.

## MILLS.

1. Though a mill-dam have occasioned land to be flowed more than twenty years, yet, if the damage occasioned thereby commenced within that period, a claim to continue flowing without compensation cannot be maintained upon prescription. *Burleigh v. Lumbert*, xxxiv. 322.

2. The three years "before the commencement of the action," during which a proprietor of land, flowed by a mill-dam, has a lien upon the mills, mean the three years before the institution of the complaint. And a judgment recovered upon such complaint is a charge upon the estate running with the land, and may be recovered against an assignee of the estate. *Pierce v. Knapp*, xxxiv. 402.

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## MORTGAGE.

If a mortgage, (which was made to secure the performance of a bond,) be assigned, the mortgagee can maintain no action upon it, unless he have also some interest in the bond; for he could have no conditional judgment. *Webb v. Flanders*, xxxii. 175.

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## PAUPER.

A special Act dividing towns, and providing as to the duty of supporting paupers *as between such towns*, passed since the R. S., will govern them. Thus, by the special Act of Feb. 24, 1842, incorporating the town of Auburn, the town of Minot is bound to maintain persons, becoming chargeable after that day, whose residence was in Minot, by residing on that part of it which was not incorporated into the town of Auburn, although, at the incorporation of Auburn, residing on the territory incorporated into the new town. *Lewiston v. Auburn*, xxxii. 492.

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## REAL ACTION.

A person in possession of lands cannot be ousted except by one having a better title. And evidence that demandant's grantor had title to only a portion of the premises sought to be recovered, and included in his deed, is material, and will so far bar his recovery, although the tenant set up no title. *Bruce v. Mitchell*, xxxix. 390.

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## SHIPPING.

1. In all cases where goods are shipped by a consignor under a contract or for his benefit he is originally liable for freight. *Holt v. Westcott*, xliii. 445.

2. The insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, "he paying freight," will not necessarily relieve the consignor from liability. If he were the owner of the goods, he may, notwithstanding, be liable. *Holt v. Westcott*, XLIII. 445.

## WATCH.

A watch, which the testator has been in the habit of carrying upon his person, does not pass by a bequest of his "wearing apparel;" nor by a bequest of his "household furniture." *Gooch v. Gooch*, XXXIII. 535.

## WAY.

To recover for damage done to a land holder, by the location of a town road, he must pursue the mode prescribed by R. S., of 1841, c. 25, § 31. Such recovery cannot be had by a statute submission of the claim to referees. *Eastman v. Stowe*, XXXVII. 86.

## WILL.

A testator appropriated and bequeathed a sum of money, of which the interest was to be annually applied toward the support of "Universalist preaching," and directed his executors to pay the fund to the trustees of a Universalist society in S., provided one should be formed within two years from the testator's death, and provided also, that an additional annual specified sum should be raised and applied from other sources toward the support of such preaching; and, upon a failure of the foregoing conditions, the fund should go to another Universalist society, upon certain prescribed conditions; and that, if the last mentioned condition should fail to be performed, the fund should be paid by the executors to the heirs of the testator: — *Held*, —

1st. That the bequest, being for charitable or pious uses, was sufficiently certain in its purposes to be upheld: —

2d. That the society, if formed within the two years, would be competent, as *cestuis que trust*, to receive the benefit of the fund: —

3d. That the trustees, whom the society should appoint, and not the society itself, were the legatees; that they alone could maintain an action for the fund: — and —

4th. That the requirement to raise and apply the prescribed additional sum annually was a condition precedent to any claim by the trustees against the executors. *Universalist Society in Sweden v. Kimball*, XXXIV. 424.

## WITNESS.

Where both parties to a replevin suit claim the property by purchase from the same vendor, his interest is balanced; and he may impeach one of the sales, without a release. *Nute v. Bryant*, XXXI. 553.













